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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA, *et al.*,
Petitioners,

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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April 22, 1989

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QUESTIONS PRESENTED

1) Whether the Court of Appeals disregarded this Court's mandate that "state laws apply to the Catawba Tribe and its members in precisely the same fashion that they apply to others" when they construed South Carolina statutes of limitations by relying on a federal policy of "protecting Indian tribes in their rightful occupancy of their lands."

(2) Whether the Catawbas' claim to "Indian title" to approximately 144,000 acres is "legal title" within the meaning of a South Carolina statute, when "Indian title" is merely a right of occupancy and the Catawbas do not have record title to the property.

PARTIES IN THE COURT OF APPEALS

Seventy-six named defendants are alleged to represent a defendant class of 27,000 landowners.* The named

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* A motion to certify the alleged class was filed but the district court stayed consideration of it pending a final ruling on the defendants' dispositive motion which is the subject of the petition.

The named defendants are the State of South Carolina, Richard W. Riley as Governor of the State of South Carolina; County of Lancaster, and its County Council consisting of Francis L. Bell as Chairman, Fred E. Plyler, Eldridge Emory, Robert L. Mobley, Barry L. Mobley, L. Eugene Hudson, Lindsay Pettus; City of Rock Hill, J. Emmett Jerome, as Mayor, and its City Council consisting of Melford A. Wilson, Elizabeth D. Rhea, Maxine Gill, Winston Searles, A. Douglas Echols, Frank W. Berry, Sr.; Bowater Carolina Corporation; Catawba Timber Co.; Celanese Corporation of America; Citizens and Southern National Bank of South Carolina; Cresent Land & Timber Corp.; Duke Power Company; Flint Realty and Construction Company; Herald Publishing Company; Home Federal Savings and Loan Association; Rock Hill Printing & Finishing Company; Roddey Estates, Inc.; Southern Railway Company; Springs Mills, Inc.; J.P. Stevens & Company; Tega Cay Associates; Wachovia Bank and Trust Company; Ashe Brick Company; Church Heritage Village & Missionary Fellowship; Nisbet Farms, Inc.; C.H. Albright, Ned Albright; J.W. Anderson, Jr., John Marshall

defendants include individuals, a family trust, a religious organization, private companies, local government organizations and the State of South Carolina. The plaintiff is "The Catawba Indian Tribe, Inc.," a non-profit organization incorporated in 1975 under South Carolina law and operated by persons who claim to be descendants of Catawba Indians.

Wilkins II, Jesse G. Anderson, John Wesley Anderson, David Goode Anderson; W.B. Ardrey, Jr., Elizabeth Ardrey Grimball, John W. Ardrey, Ardrey Farms; F.S. Barnes, Jr.; W. Watson Barron, Wilson Barron; Archie B. Carroll, Jr.; Hugh William Close, James Bradley, Francis Lay Springs, Lillian Crandall Close, Francis Allison Close, Leroy Springs Close, Patricia Close, William Elliot Close, Hugh William Close, Jr.; Robert A. Fewell; W.J. Harris, Annie F. Harris; T.W. Hutchinson, Hiram Hutchinson, Jr.; J.R. McAlhaney; F.M. Mack, Jr.; Arnold F. Marshall; J.E. Marshall, Jr.; C.D. Reid, Jr.; Will R. Simpson, John S. Simpson, Robert F. Simpson; Thomas Brown Snodgrass, Jr.; John M. Spratt; Marshall E. Walker; Hugh M. White, Jr.; John M. Belk; Jane Nisbet Good, R.N. Bencher, W.O. Nisbet III; Pauline B. Gunter; J. Max Minson; W.A. McCorkle, Mary McCorkle; William O. Nisbet; Eugenia Nisbet White, Mary Nisbet Purvis, E.N. Martin; Robert M. Yoder.

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CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, entered on January 23, 1989.

OPINIONS BELOW

On June 14, 1982 the district court granted the defendants' ("petitioners'") motion for summary judgment and dismissed the action. *Catawba Indian Tribe of South Carolina* v. *State of South Carolina*, No. 80-2050 (D.S.C. June 14, 1982) (Appendix, Exhibit B, at 36). The plaintiff ("respondent" or "Catawbas") appealed, and, on October 11, 1983, a divided three-judge panel reversed the district court's decision. *Catawba Indian Tribe of South Carolina* v. *South Carolina*, 718 F.2d 1291 (4th Cir. 1983).[1]

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[1] Because the opinions of the Fourth Circuit which preceded this Court's 1986 decision are not the subject of this petition, they have not been reproduced herein.

The petitioners sought and obtained a rehearing *en banc*. On August 17, 1984, in a one paragraph per curiam opinion, four judges adopted the original panel's majority opinion and three judges adopted the dissenting opinion. One judge who joined the *en banc* majority decision also issued a concurring opinion. *Catawba Indian Tribe of South Carolina* v. *State of South Carolina*, 740 F.2d 305 (4th Cir. 1984).

This Court granted *certiorari* and reversed and remanded to the Fourth Circuit. *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 106 S.Ct. 2039 (1986). (Appendix, Exhibit C, at 55). Upon remand the *en banc* panel of the Fourth Circuit affirmed in part and reversed in part the judgment of the district court and remanded for further proceedings consistent with its opinion. *Catawba Indian Tribe* v. *State of South Carolina*, No. 82-1671 (4th Cir., Jan. 23, 1989) (Appendix, Exhibit A, at 1).[2]

JURISDICTION

This Court has jurisdiction to review the final decision of the Court of Appeals under 28 U.S.C. § 1254(1) (1976).

STATUTES TO BE CONSTRUED

The decision below construed certain South Carolina statutes of limitations, principally §§ 15-3-340 and 15-67-210 of the South Carolina Code. Those sections provide:

S.C. Code Ann. § 15-3-340

> No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action.

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[2] The *en banc* majority on remand was composed of Senior Judge Butzner, and Judges Phillips, Murnaghan and Sprouse. Judges Hall and Widener dissented in separate opinions.

S.C. Code Ann. § 15-67-210

> In every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law. The occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appears that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action.

STATEMENT OF THE CASE

I. The Parties And The Nature Of The Claim.

The Catawbas assert a claim to approximately 144,000 acres (225 square miles) at the northern border of South Carolina in York, Lancaster and, perhaps, Chester Counties.[3] The respondent claims the current right to own and possess this land and demands trespass damages from 1840 to the present.

The land in dispute encompasses the City of Rock Hill, the town of Fort Mill, and a number of smaller communities. Thousands of families, as well as small businesses, farms, trusts, lending institutions, manufacturers, churches, charitable organizations, local governments, and the State of South Carolina currently hold interests in the land. Seventy-six individuals, companies and public entities have been named as defendants and as representatives of an uncertified putative defendant class alleged to consist of more than 27,000 persons.

Respondent is a non-profit organization incorporated in 1975 under South Carolina law which calls itself "the Catawba Indian Tribe, Inc." This organization contends that a voluntary sale of the lands in issue pursuant to an

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[3] The precise boundaries of the land at issue are uncertain because of the poor quality of eighteenth-century surveying and mapping.

1840 treaty with the State of South Carolina was invalid, that it retains the right to void the 1840 transaction, that it may recover millions of dollars in damages for nearly a century-and-a-half of alleged trespasses, and that it may dispossess thousands of innocent people from their homes, farms and businesses. According to the respondent, a federal statute known as the Nonintercourse Act [4] required federal approval or consent to this voluntary sale, and such federal approval or consent was lacking.

II. The Proceedings Below And The Issues For Review.

The district court entered summary judgment for the defendants, holding, *inter alia*, that a 1959 federal statute commonly referred to as the "Catawba termination act," 25 U.S.C. §§ 931-938 (1976), made state law apply to any claim the Catawbas might have and that the claim was barred by the South Carolina statute of limitations, S.C. Code Ann. § 15-3-340. *Catawba Indian Tribe of South Carolina* v. *State of South Carolina*, No. 80-2050 (D.S.C. June 14, 1982) (Memorandum and Order Granting Summary Judgment). (A. 47).

A divided panel of the Fourth Circuit reversed and remanded. *Catawba Indian Tribe of South Carolina* v. *State of South Carolina*, 718 F.2d 1291 (4th Cir. 1983). The majority held that the federal statute did not cause the state statute of limitations to apply to the Catawbas' claim. *Id.* at 1300. The dissent held that the Catawba act made South Carolina laws fully applicable to any claim the plaintiff may have had and that the Catawbas' claim was entirely barred by South Carolina's statutes of limitations governing real property. *Id.* at 1301. The

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[4] The Nonintercourse Act is presently codified at 25 U.S.C. § 177 (1976). The term refers to restrictions on the alienation of Indian lands contained in a series of more comprehensive acts regulating Indian affairs, each known as the "Indian Trade and Intercourse Act," first enacted in 1790 and most recently modified in 1834.

Jurisdiction in the district court was asserted pursuant to 28 U.S.C. §§ 1331, 1337 and 1361.

panel's decision was summarily affirmed by a four to three majority of the Fourth Circuit sitting *en banc*. *Catawba Indian Tribe of South Carolina* v. *State of South Carolina*, 740 F.2d 305 (4th Cir. 1984) (*per curiam*).

This Court granted *certiorari* and reversed, holding that the Catawba termination act had made "state laws apply to the Catawba Tribe and its members in precisely the same fashion that they apply to others." *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986) (A. 63). In so holding, this Court found that the Catawba act represented an "explicit redefinition of the relationship between the Federal Government and the Catawbas," so that "the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction." (A. 68). This Court did not decide whether the South Carolina statute of limitations operated to bar the Catawbas' claim. Instead, "[b]ecause the Court of Appeals is in a better position to evaluate such an issue of state law," the case was remanded to the Fourth Circuit for a review of the district court's holding that the statute of limitations completely barred the claim. *Id.*

On January 23, 1989, after an unsuccessful attempt to certify questions to the Supreme Court of South Carolina, the *en banc* panel of the Court of Appeals held, by a vote of four to two, that the South Carolina statutes of limitations bar the respondent from recovering some, but not all, the property in dispute. (A. 3). According to the majority, property that has been held and possessed adversely (without tacking except by inheritance) for ten years between July 1, 1962, the effective date of the Catawba termination act, and October 20, 1980 (the date this action was commenced) is not subject to the claim. Absent such a showing, the statutes of limitation did not bar the claim against any other landowner.

To reach that result, the Court of Appeals relied upon more than state law. The South Carolina general limita-

tions statute applicable to the recovery of possession of real property, S.C. Code Ann. § 15-3-340, provides that no action shall be brought unless the plaintiff was "seized or possessed" of the premises within ten years before the commencement of the action. By its own admissions, the Catawbas have conceded that this was not the case for one hundred forty years before this action was commenced, including the eighteen years since the state statute of limitations became applicable to them. To avoid the bar of the limitations statute, the Catawbas have sought to rely on S.C. Code Ann. § 15-67-210 which creates a presumption of possession if the plaintiff establishes "legal title."

Departing from an exclusive focus on state law, the Court of Appeals declared that consistency with the policy of the United States and the Nonintercourse Act required that the respondent's Indian title be considered equivalent to "legal title."[5] (A. 15). The dissenting judges concluded that such an interpretation "defeats the very purpose of South Carolina's statute of limitations by allowing a stale claim." (A. 28). According to them, "South Carolina has clearly sought to impose finality in potential land disputes by requiring a party out of possession to bring an action within ten years." (A. 30 n.2).

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[5] Having determined that the respondent had "legal title" and could therefore invoke the presumption set forth in Section 15-67-210, the Fourth Circuit concluded that the presumption could only be rebutted by a showing of adverse possession for ten years before the commencement of such action. Although the respondent delayed eighteen years following the effective date of the Catawba termination act before instituting this action, South Carolina, contrary to "an overwhelming majority of jurisdictions," does not permit tacking between successive adverse occupants of land except by inheritance. (A. 22). As a result, the Fourth Circuit held that the respondent is precluded only against a person who holds and possesses property that has been held and possessed adversely to the respondent for ten years after the revocation of the respondent's constitution, July 1, 1962, and before the commencement of this action, October 20, 1980, without tacking except by inheritance.

REASONS FOR GRANTING THE WRIT

I. The Questions Presented Are Of Extreme Importance.

This Court previously granted *certiorari* "[b]ecause of the importance of the case." *South Carolina* v. *Catawba Indian Tribe, Inc.* (A. 62). Indeed, in response to this Court's inquiry, the Solicitor General concluded that the issues presented were of "considerable practical and immediate importance." Brief For The United States as Amicus Curiae, p. 18 (May, 1985). Acknowledging the interlocutory posture of the case, the Solicitor General argued that prompt resolution of the limitations issue would substantially serve the policies underlying such statutes. *Id.* at 19.

The significance of this case and the need to promptly resolve the limitations issue have not diminished. Prompt review is required because an extraordinarily large number of innocent landowners will otherwise suffer substantial and unnecessary harm even if they ultimately prevail on the merits at trial or later secure review by this Court. Indian land claims are complex, involving many competing and significant interests, and are not easily or quickly litigated. Accordingly, if review is not granted now, it may be a decade or more before this Court has the opportunity to completely resolve the potentially dispositive issue of whether the application of state laws to this claim barred the action in its entirety when it was commenced in 1980.

The recognition by the Court of Appeals that certain present-day landowners may ultimately avoid the claim does not lessen the importance of immediate review. The Catawbas contend that every landowner must continue to litigate because each landowner must demonstrate the requisite period of possession together with an actual in-

tent to dispossess the Catawbas. Moreover, the Court of Appeals deprived landowners of the bar of S.C. Code Ann. § 15-3-340 if their land was not held or possessed for ten consecutive years during the 1962 to 1980 period. The Catawbas have contended that "[p]robably a majority of the 27,000 members" of the alleged defendant class of property owners would be left unaffected by such a ruling. Respondent Tribe's Supplemental Brief in Opposition to Petition for Certiorari (1986), p. 5. Years of continuing litigation will result in a cloud on land titles requiring innocent citizens to defend their homes and businesses in protracted litigation at great expense. In fact, the *in terrorem* effect of the litigation extends far beyond the direct threat to property interests because the litigation is an impediment to development of the region harming all of its citizens.[6]

The Court of Appeals' interpretation also will result in litigation on the underlying merits of this claim against those who are least able to litigate. The opinion of the Court of Appeals leaves at risk those property owners whose property was conveyed during the eighteen-year period before this action was commenced. As the Catawbas themselves recognized, this will "presumably bar tribal claims against many of the larger, more established property owners, while leaving the brunt of the litigation to be borne by the more numerous small landowners." *Ibid.* Particularly given this inequitable outcome, review by this Court should not be delayed.

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[6] A recent study of the economic impact of this claim reported that over $200,000,000 in real estate transactions had been impeded, which resulted in $2,000,000 in direct monthly costs and unquantified indirect costs (including lost economic gains from the failure to add 42 jobs per month). Report Prepared for the Rock Hill Chamber of Commerce by Associate Professor of Economics Darrell Parker (Winthrop College, 1989).

II. The Court Of Appeals Disregarded This Court's Direction On Remand To Apply The Limitation Statute To The Respondent In The Same Fashion As To Other Citizens And Misconstrued The Nature Of Both Indian Title Under Federal Law And "Legal Title" Under State Law.

In its earlier opinion, this Court ruled that the "unmistakably clear language" of the Catawba termination act represented "an explicit redefinition of the relationship between the Federal Government and the Catawbas" and "an intentional termination of the special federal protection for the Tribe and its members . . ." (A. 63, 65). As a result, that act "requires the application of the state statute of limitations to the tribe's claim." (A. 68). This Court remanded to the Court of Appeals with direction to review the District Court's interpretation of state law in light of the Court's conclusion that "state laws apply to the Catawba Tribe and its members in precisely the same fashion that they apply to others." (A. 63).

Notwithstanding that command, the Court of Appeals relied upon its view that the respondent held a special status under federal law: it concluded that the statute of limitations should not apply to the respondent's claims because of the federal policy to "protect Indian tribes in their rightful occupancy of their lands." (A. 15). In short, the Court of Appeals' reasoning and conclusion directly contravened this Court's holding that the respondent must proceed as any other citizen because "the termination act constituted an intentional termination of the special federal protection of the Tribe and its members . . ." (A. 65).

Indeed, although the decision to remand was based on the Court's view that "the Court of Appeals is in a better position to evaluate . . . an issue of state law," (A. 68), the result of the remand is a holding almost wholly dependent on an erroneous interpretation of *federal law*—the nature of Indian title. To reach its finding

that Indian title is the same as "legal title" under the South Carolina statute of limitations, the Court of Appeals ignored settled precedent from this Court defining Indian title as merely a right of occupancy. In its determination *not* to apply the statute of limitations to the Catawbas "in precisely the same fashion" as it applies to others, the Court of Appeals also erred when it interpreted state law. The failure of an appellate court to properly apply this Court's directions on remand have warranted review by a grant of certiorari. *See e.g.*, *Oklahoma Tax Commission* v. *Graham*, —— U.S. ——, 57 U.S.L.W. 4400 (Mar. 29, 1989) (per curiam); *Sumner* v. *Mata*, 455 U.S. 591, 598 (1982).

A. *By Premising Its Decision On The Respondent's Assumed Status As An Indian Tribe And The Trust Relationship Enjoyed By Tribes With The Federal Government, The Court Of Appeals Disregarded The Court's Direction To Apply The Limitation Statute To The Plaintiff In The Same Fashion As To Other Citizens Of South Carolina.*

This Court concluded that when the Catawba termination act became effective in 1962 the laws of South Carolina, including the state's statute of limitations, began to apply to the tribe and its members in the same fashion as to other persons and citizens in the state. Accordingly, the dispositive issue on remand was whether the respondents could avoid the requirement that they have possessed the land within ten years by relying upon a presumption of possession afforded to holders of "legal title" under S.C. Code Ann. § 15-67-210; in short, whether their claim to Indian title equals "legal title."

The linchpin of the court's ultimate holding was its conclusion that policies embodied in *federal* Indian law required that Indian title be considered the same as legal title. In the section of the opinion purporting to discuss the nature of Indian title, the Court of Appeals mischaracterized the issue as one which "requires us to examine

the relationship of the United States as a guardian or trustee for the tribe particularly with respect to the nature of the tribe's Indian title." (A. 11). According to this Court's mandate, however, the relevant body of law is not the law dealing with the trust relationship between the federal government and Indian tribes; it is state law which applies "to the Catawba Tribe and its members in precisely the same fashion that . . . it appl[ies] to others."

Having asked the wrong questions, it is not surprising that the Court of Appeals arrived at the wrong answer. The court held that:

> [Application of the statute of limitation to the plaintiffs' claim] conflicts with the policy of the United States and the Nonintercourse Act. This policy and the Act protect Indian tribes in their rightful occupancy of their lands. To use the trusteeship created by the Constitution and implemented by the Act to defeat a tribe's right of occupancy would indeed be ironic and unjust.

(A. 15).

Plainly, the Court of Appeals' application of the limitation statute was premised on the respondent's alleged status as an Indian tribe, and the statute was not applied to them as it would have been to other citizens. Absent this erroneous premise, there is no analytical support for the court's opinion at all.

B. *The Court Of Appeals' Holding That "Indian Title" Equals "Legal Title" Conflicts With This Court's Prior Decisions.*

To the extent the Court of Appeals analyzed the meaning of Indian title at all—rather than simply concluding that federal law required it to be considered the same as "legal title" under South Carolina law—its opinion conflicts with this Court's prior decisions. Under those decisions, Indian tribes have no "title" at all in their ancestral land. Their property right is purely one of occu-

pancy. Moreover, because the Court of Appeals assumed that right to be inalienable without the consent of the federal government, it is an equitable, not legal, interest. The Court of Appeals' misinterpretation of the nature of Indian title, a question of federal law, warrants this Court's review.

1. *Indian Title Is A Right Of Occupancy, Not Title.*

The Court of Appeals began its analysis by noting the settled distinction between Indian title and fee simple title:

> Indian title includes a right to possession superior to that incident to fee simple title; where Indian title and fee simple title coexist, the fee simple interest operates merely as a reversionary right to possession which can take effect only when Congress extinguishes the Indian title.

(A. 7). It concluded, however, by erroneously finding that:

> as a matter of federal law, for the purpose of recovering possession of real property and damages against any defendant other than the United States, Indian title is equivalent to fee simple absolute title. It is legal title.

(A. 15).

The Court of Appeals' characterization of Indian title as "legal title" was based on a single sentence fragment from this Court's decision in *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). *Johnson* states that Indians generally have "a legal as well as just claim to retain possession [of their aboriginal property]." 21 U.S. at 574. From this statement, the court reasoned that "a legal claim presupposes a legal title." (A. 15).

To be sure, *Johnson* is the seminal source of the meaning of Indian title.[7] But the passage which includes the

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[7] *Johnson* involved a dispute over land that had once been under the domain of the Illinois and Piankeshaw Indians. The plain-

sentence fragment relied on by the Court of Appeals does not lead to the conclusion that Indian title is legal title. Rather, *Johnson* shows that the phrase "Indian title" is a misnomer for what is purely a right of occupancy:

> In the establishment of these relations [between the Indian Tribes and the Colonial powers], the rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by *the original fundamental principle, that discovery gave exclusive title to those who made it.* While the different nations of Europe respected the right of the natives, as occupants, they asserted *the ultimate dominion to be in themselves*; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives. *These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.*[8]

21 U.S. at 574 (emphasis added).

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tiffs claimed title through sales made by the tribes directly to British subjects. Defendants claimed title by a patent from the United States, which had received the land by treaty from the Indians. To decide the case, the Court was required to determine the validity of the conveyances from the Tribes to the individuals. To do so, the Court had to examine the nature of the Tribes' prior interest in the property.

[8] Fee title to the land possessed by the Colonial powers was relinquished to the original thirteen states if the land was located within the area of the original colonies. Outside the territory of the original thirteen states, fee title was passed to the United States. *Oneida Indian Nation of New York State* v. *County of Oneida, New York*, 414 U.S. 661, 670 (1974).

Chief Justice Marshall also stated plainly that by virtue of the treaty which concluded the American Revolution, the United States or the thirteen original states had the sole title to the land of the United States:

> It has never been doubted, that either the United States, or the several states, *had a clear title to all the lands* within the boundary lines described in the treaty, subject only to the Indian right of occupancy . . .
>
> An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. *All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy*, and recognize the absolute title of the crown to extinguish that right.

21 U.S. at 584-85, 588 (emphasis added).

The Court revisited the meaning of Indian title in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955). In *Tee-Hit-Ton*, a group of Indians alleged that the United States had violated their Fifth Amendment rights by taking timber, without compensation, from lands over which the Indians claimed Indian title. The Indians sought compensation for the timber. The Court found that no statute gave the Indians the right to the requested compensation, and that Indian title alone was not a property right, and therefore could not be the basis for a claim of wrongful taking by the federal government. On the subject of Indian title, the Court stated that:

> It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description *means mere possession not specif-*

> *ically recognized as ownership by Congress . . . This is not a property right but amounts to a right of occupancy . . .*

348 U.S. at 279 (emphasis added).

The elements of Indian title established in *Johnson* and reaffirmed in *Tee-Hit-Ton* were confirmed once more in *Oneida Indian Nation of New York State* v. *County of Oneida, New York*, 414 U.S. 661 (1974). In *Oneida*, the Court decided whether the Oneida Tribe's claim for possession of property gave rise to a justiciable federal controversy. The Court ultimately concluded that the Tribe asserted a right to possession conferred by federal law, and that a federal controversy was asserted. To reach this conclusion, the Court analyzed the nature of the Tribe's possessory rights in relation to those of the sovereign:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. . . . Indian title, *recognized to be only a right of occupancy*, was extinguishable only by the United States.

414 U.S. at 667 (emphasis added).

Thus, the Court's holdings in *Johnson*, *Tee-Hit-Ton* and *Oneida* make clear that, from the time of this nation's inception, the exclusive title to all of its land was first held by the original States and the United States, which were then free to grant property, with full title, to grantees. Indian tribes that assert possessory rights over property for which they claim to have Indian title do not possess actual title; they possess a *mere right of occupancy*. This right of occupancy does not constitute ownership; indeed, according to this Court in *Tee-Hit-Ton*, it does not constitute a property right at all.

Simply put, the respondent does not have "title" to the property, legal or otherwise, in any conventional meaning of the word which the South Carolina legislature might have contemplated in enacting S.C. Code Ann. § 15-67-210.[9] Title to the property is possessed by the petitioners, the last links in a chain of title extending back to the founding of this country when the sovereign, the State of Carolina, took fee title to all of the lands within its borders.

C. *In Its Determination To Avoid The Mandate Of This Court, The Court Of Appeals Also Misinterpreted State Law.*

The Court of Appeals not only misunderstood the nature of Indian title. Its incorrect focus on federal Indian policy rather than state law also led it to misinterpret state law in a way that would strongly undermine the state policy favoring stability and repose in land titles through deference to the state's title recordation system. In substance, the Court of Appeals presumed the timeliness of the respondent's claim by presuming the validity of the claim on the merits. This reasoning ignores the purpose of the limitation statute to foster stability

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[9] Not only do the Catawbas lack "title" to the land, any interest in the land which they do possess is an equitable, not legal interest. As the Court of Appeals noted in certifying the case to the Supreme Court of South Carolina, "Indian title cannot be alienated except by Act of Congress . . ." Such restraints on the Catawbas' interest mandate the conclusion that their interest is equitable, not legal. Ownership of land without an ability to alienate is repugnant to law and any such estate in land will only be recognized in equity. *See e.g., Lynch* v. *Lynch*, 161 S.C. 170, 176, 159 S.E. 26, 28 (1931) (" 'it is against the policy of the law for the grant to be so limited that a donee shall have the possession and enjoyment of the property, but shall not have the power of alienation . . .' "; in such a case, the estate can only be "equitable"), quoting *Kessner* v. *Phillips*, 189 Mo. 515, 88 S.W. 66, 67 (1905).

and repose by foreclosing all untimely claims, whether or not valid on the merits.[10]

1. *"Legal Title" Under S.C. Code Ann. § 15-67-210 Means The Title Of Record.*

South Carolina has had a sophisticated system of land registration since at least 1698.[11] The system encourages compliance with the state recordation laws by using S.C. Code Ann. § 15-67-210 to award a presumption of possession to the person with record title, unless the record title holder has been ousted by another's adverse possession for ten years. In this fashion, the statutes foster certainty of land titles by relying on the land registration system of the state.

South Carolina courts repeatedly have recognized, in a variety of contexts, that the person holding the recorded title is the holder of "legal title."[12] That "legal title"

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[10] In fact, as Judge Hall writes in his dissent, because of the recusal of many members of the Fourth Circuit, "the Catawbas have managed to have their state law case decided by a court with substantially reduced familiarity with South Carolina law." (A. 35). As a result, a traditional premise for deference to the Court of Appeals on matters involving state law was diminished.

[11] In that year the Colony established the Registry of Mesne Conveyances for recordation of land transactions providing that transactions so registered "shall be taken, deemed, adjudged, allowed of and held . . . to be good, firm, substantial and lawful in all Courts of Judicature within South Carolina." 1 *The Earliest Printed Laws of South Carolina 1692-1734* at 134-35 (Cushing ed.) (1978).

[12] *Parr* v. *Parr*, 268 S.C. 58, 231 S.E.2d 695, 697 (1977) (where son transmitted deed to his father, but it remained unrecorded in a safe, court held, "[L]egal title to the land remained in [the son] under the recorded deed . . ."); *Lynch* v. *Lynch*, 236 S.C. 612, 115 S.E.2d 301, 304 (1960) (person holding record title entitled to the presumption of possession; court declares that where recorded deed and plats reflect that disputed property is respondents', "trial judge was correct in holding, as a matter of law, that the record shows a life estate in the respondent" and awarding pre-

is recorded title was expressly recognized in *Zorn* v. *Railroad Co.*, 5 S.C. 90 (1874). There the Supreme Court of South Carolina explained the function of South Carolina's recording system and the relationship between legal and equitable title in considering whether a purchaser at a land sale was bound by a prior unrecorded mortgage:

> The English registry Acts made the unregistered deed or incumbrance at law wholly inoperative and void, as against a subsequent grantee or incumbrancer. But the Court of Chancery, in accordance with the manifest spirit and intention of the statute, at an early day adopted the principle of considering the prior deed or incumbrance as an equitable title or lien. It, therefore, applied to such cases, the equitable principles which had previously been adopted by that Court in relation to other contests between the holder of an equitable title or lien and a subsequent grantee or mortgagee of the legal title. In accordance with these principles, if the subsequent purchaser or mortgagee was a bona fide purchaser, that is, if he had actually parted with his property on the credit of the estate, so as to give him an equitable claim or specific lien thereon, without notice of the prior equity, and had also clothed that equitable lien with the legal title by taking a deed or mortgage, the Court would not divest him of that legal title or lien in favor of the prior equity. But if he had notice of the prior equity at any time before he had parted with his property on the credit of the estate, and before he had united the subsequent equity with the legal title,

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sumption of possession); *Knight* v. *Hilton*, 224 S.C. 452, 79 S.E.2d 871, 873 (1954) ("It is clear that the legal or record title to the 50-acre tract is vested in the heirs-at-law of T.W. Knight and Cecil G. Knight . . . Possession is presumed to follow such title . . ."); *Stokes* v. *Murray*, 102 S.C. 395, 87 S.E. 71, 72 (1915) (where case had been pleaded and tried as a dispute between legal titles, defendants' claim that they had paid for property and were entitled to a deed was stricken because it set up an unpled issue of equitable title).

> he was not considered as entitled to protection against the prior equity as a bona fide purchaser.

Zorn, *supra*, at 101-102, *quoting* and adopting *Dickerson* v. *Tillinghast*, 4 Paige Ch. N.Y. 215 (1833). *Zorn* thus shows that "legal title" is the title on record, and those interests which remain unrecorded are "equitable" title.[13]

2. *Record Title Was Never In The Respondent.*

For the purposes of summary judgment, the respondent's claim was assumed to derive from two treaties between the Catawbas and the English crown. Pursuant to these treaties, the Catawbas agreed that they would be "satisfied" with a fifteen mile square tract of its aboriginal land. A survey of that tract ultimately was filed with the South Carolina Secretary of State. (A. 8).

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[13] In construing state statutes identical or similar to S.C. Code Ann. § 15-67-210, courts in other jurisdictions have held that "legal title" as used in those statutes is record title. *See Orange & Rockland Util., Inc.* v. *Philwold Estates, Inc.*, 52 N.Y.2d 253, 418 N.E.2d 1310, 1313 (1981) ("record owners of the property" were "holder[s] of legal title"); *Cory* v. *Hotchkiss*, 31 Cal. App. 443, 160 P. 841, 842 (1916) ("The record title to the land having been shown to be in plaintiff, presumptively he was seised of the possession within the time required by law . . ."); *People's Water Co.* v. *Lewis*, 19 Cal. App. 622, 127 P. 506 (1912); *Holen* v. *Phelps*, 131 Mont. 146, 308 P.2d 624, 627 (1957) ("owner of the record title" set up presumption of possession); *Smith* v. *Whitney*, 105 Mont. 523, 74 P.2d 450, 454 (1937) ("owner of the record title . . . proved a prima facie case" of possession); *Horton* v. *Smith-Richardson Inv. Co.*, 81 Fla. 255, 87 So. 905, 907 (1921) (plaintiff proved "legal title" by showing record chain of title); *Enderlin Inv. Co.* v. *Nordhagen*, 18 N.D. 517, 123 N.W. 390, 392 (1909) (record title was "legal title" and "this carried a presumption of possession . . ."); *Houghton County* v. *Massis*, 215 Mich. 654, 184 N.W. 446 (1921) ("The plaintiff, having title of record to the land, is deemed . . . to be in seisin and possession thereof"); 3 Miller and Starr, *Current Law of California Real Estate* § 19.1 (1977) ("It is presumed that the person holding the record legal title is the owner of the property and in possession and therefore the adverse possessor must prove each of the statutory elements of adverse possession in order to establish his title. If he does the burden of proof shifts to the record owner to disprove the claimant's title.").

Seemingly implying that the respondent had record title of a sort, the Court of Appeals concluded that because the survey was filed with the Secretary of State "the tribe's claim to legal title for the purpose of invoking the presumption provided in section 15-67-210 is not defeated by lack of recording in the Registry of Mesne Conveyances." (A. 11).

Filing a survey with the Secretary of State cannot give the Catawbas "record title." Since at least 1731, South Carolina law has required that an instrument be recorded in the county where the property is located to be effective against later purchasers. S.C. Code Ann. § 30-7-10; Means, *The Recording of Land Titles in South Carolina*, 10 S.C.L.Q. 346, 353 (1958). This requirement allows an examiner of title to know where to find a document affecting title. Neither the respondent nor the Court of Appeals claims there is any recorded document in the counties where the land is located reflecting the respondent's claimed interest. As the dissent stated, "logically . . . 'legal title' must be some mechanism that would give adequate notice to another claimant that the statute of limitation is unavailable." (A. 30 n.2).

3. *The Court Of Appeals Improperly Confused The Timeliness Of The Claim With Its Merits.*

The Court of Appeals recognized that in 1840 the Catawbas entered into the Treaty of Nation Ford by the terms of which "the tribe transferred its interest in the tract to South Carolina." (A. 4). At least since that transfer, the record title to the land as recorded in the state's land title registration system has been in the defendants or their predecessors, who have relied on the certainty of the title records to demonstrate their ownership.[14] The Catawbas' claim that the 1840 transfer

[14] Indeed, the South Carolina statute that the Court of Appeals cites to show that the legislature acknowledged "that the 1764 survey of Catawba lands was duly filed," App. 11, is the very statute that conveyed the State's interest in the Catawbas' land to the predecessors of the current landowners. The statute, S.C. Code Ann.

is void is irrelevant to the question of who presently has legal title.

The Court of Appeals erred because it treated the respondent's claim to recover possession of the land as if the claim itself were legal title. According to their reasoning, because the respondent was assumed to have a valid claim to Indian title, its 140-year-old claim was timely. As the dissent in the Court of Appeals noted, this approach defies common sense and undermines the purpose of any limitation statute.[15]

This Court has stated repeatedly that statutes of limitations serve the important societal interests of stability and repose. *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979).[16] In particular, the Court has repeatedly recog-

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§ 27-15-30, provides that the State's "right, title and interest" in the surveyed Catawba lands "are hereby vested" in the persons who had been lessees of the land from the Catawbas. Under S.C. Code Ann. § 27-15-40, the State established a procedure for the lessees to obtain grants from the State evidencing their ownership and entitling them "thenceforth [to] hold the land so granted in the same right as any other lands granted by this State are held." Thus, while the statute may have acknowledged the survey of the Catawbas' land, it was in the context of the transfer of legal title to the defendants' predecessors.

[15] In his dissent in the court below, Judge Hall said that the majority's reasoning "permitted an exception to devour the rule" and was contrary to the purpose of the limitation statute "to impose finality in potential land disputes." (A. 30 n.12).

[16] In *Kubrick*, this Court wrote:

Statutes of limitation, which "are found and approved in all systems of enlightened jurisprudence," *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of state claims in time comes to prevail over the right to prosecute them." [*Order of*] *Railroad Telegraphers* v. *Railway Express Agency*, [*Inc.*], 321 U.S. 342, 349 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether

nized the special importance of stability in land titles. *See, e.g., Summa Corp.* v. *California*, 466 U.S. 198, 206 (1984); *Arizona* v. *California*, 460 U.S. 605, 620 (1983); *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486-487 (1924). The importance of stability and repose in the ownership of real property has also been emphasized by the South Carolina Supreme Court in pointing out South Carolina's policy of discouraging untimely land claims:

> These stale demands are not to be encouraged. Nothing tends more to disturb the quiet and repose of the community. Families are broken up, purchasers disturbed in their possessions, and creditors, who have trusted others upon the credit of their long possessions, are disappointed in their just expectations by some dormant claim which could not have been anticipated.

Fogel v. *Void*, 223 S.C. 83, 74 S.E.2d 358, 360 (1953), *quoting Frady* v. *Invester*, 129 S.C. 536, 125 S.E. 134, 137 (1924), *quoting Turpin* v. *Brannon*, 6 S.C. (3 McCord) 261, 268 (1825).

To achieve the repose that is the purpose of a limitation statute, the statute must foreclose untimely claims, without regard to whether the claims are valid on the merits. This was recognized by the Court in *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 463-4 (1975) ("Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting the suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones"), and *Kava-*

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by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. *United States* v. *Marion*, 404 U.S. 307, 322 n.14 (1971); *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 428 (1965); *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945); *Missouri, K. & T.R. Co.* v. *Harriman* [*Brothers*], 227 U.S. 657, 672 (1913); *Bell* v. *Morrison*, [26 U.S. (]1 Pet.[)] 351, 360 (1828).

naugh v. *Noble*, 332 U.S. 535, 539 (1947) ([P]eriods [of limitations] are established to cut off rights, justifiable or not. . . . Remedies for resulting inequities are to be provided by Congress, not the courts").

The Court of Appeals' reasoning, on the other hand, resembles that rejected by decisions of this Court and others in holding that the alleged invalidity of a transfer of Indian land interests does not defeat the application of the appropriate statute of limitations. *See United States* v. *Mottaz*, 476 U.S. 834, 106 S.Ct. 2224, 2230 (1986) (reversing Court of Appeals' holding that "if the underlying sale of land is void, . . . [the statute of limitations] is inapplicable because the allottee simply retain[ed] title all along"); *Joines* v. *Patterson*, 274 U.S. 544 (1927) (reversing holding that the state statute of limitations had not begun to run on the claim "since no interest had passed to [the purchaser]" pursuant to the allegedly invalid sale); *Wolfe* v. *Phillips*, 172 F.2d 481, 486 (10th Cir.), *cert. denied*, 336 U.S. 968 (1949) ("[t]he [statute] began to run . . . and the instant action became barred . . . irrespective of whether the [allegedly void] deed was valid or void. Therefore, we find it unnecessary to determine the conflicting contentions of the parties with respect to the validity of such deed").

By making the limitation statute inapplicable because of the presumed validity of the respondent's claim, the Court of Appeals made the limitation statute meaningless. A statute of limitations which bars only invalid claims, but does not affect valid ones, places no meaningful limitations on claims at all. The Court of Appeals' reasoning is but a further reflection of its failure to follow the Court's mandate to apply state law to the respondent as to all other citizens. In addressing the issue before it—the application of the state limitations statute to respondent's claims—the court mistakenly turned for guidance to the policies embodied in federal Indian law rather than the policies advanced by South Carolina's statutes of limitations and land title recordation system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 22, 1989

APPENDICES

EXHIBIT A

The En Banc Decision Of The Fourth Circuit On Remand

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1671

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, also known as the CATAWBA NATION OF SOUTH CAROLINA,
Appellant,

v.

STATE OF SOUTH CAROLINA, RICHARD W. RILEY, as Governor of the State of South Carolina; COUNTY OF LANCASTER, and its COUNTY COUNCIL consisting of FRANCIS L. BELL as Chairman, FRED E. PLYLER, ELDRIDGE EMORY, ROBERT L. MOBLEY, BARRY L. MOBLEY, L. EUGENE HUDSON, LINDSAY PETTUS; CITY OF ROCK HILL, J. EMMETT JEROME, as Mayor, and its CITY COUNCIL consisting of MELFORD A. WILSON, ELIZABETH D. RHEA, MAXINE GILL, WINSTON SEARLES, A. DOUGLAS ECHOLS, FRANK W. BERRY, SR.; BOWATER NORTH AMERICAN CORPORATION, CATAWBA TIMBER CO.; CELANESE CORPORATION OF AMERICA; CITIZENS AND SOUTHERN NATIONAL BANK OF SOUTH CAROLINA; CRESENT LAND & TIMBER CORP.; DUKE POWER COMPANY; FLINT REALTY AND CONSTRUCTION COMPANY; HERALD PUBLISHING COMPANY; HOME FEDERAL SAVINGS AND LOAN ASSOCIATION; ROCK HILL PRINTING & FINISHING COMPANY; RODDEY ESTATES, INC.; SOUTHERN RAILWAY COMPANY; SPRINGS MILLS, INC.; J.P. STEVENS & COMPANY; TEGA CAY ASSOCIATES; WACHOVIA BANK AND TRUST COMPANY; ASHE BRICK COMPANY; CHURCH HERITAGE VILLAGE & MISSIONARY FELLOWSHIP; NISBET FARMS, INC.; C.H. ALBRIGHT, NED ALBRIGHT; J.W. ANDERSON, JR., JOHN MARSHALL WILKINS, II, JESSE

G. ANDERSON, JOHN WESLEY ANDERSON, DAVID GOODE ANDERSON, W.B. ARDREY, JR., ELIZA BETH ARDREY GRIMBALL, JOHN W. ARDREY, ARDREY FARMS; F.S. BARNES, JR.; W. WATSON BARRON, WILSON BARRON; ARCHIE B. CARROLL, JR., HUGH WILLIAM CLOSE, JAMES BRADLEY, FRANCIS LAY SPRINGS, LILLIAN CRANDAL CLOSE, FRANCIS ALLISON CLOSE, LEROY SPRINGS CLOSE, PATRICIA CLOSE, WILLIAM ELLIOT CLOSE, HUGH WILLIAM CLOSE, JR.; ROBERT A. FEWELL; W.J. HARRIS, ANNIE F. HARRIS; T.W. HUTCHINSON, HIRAM HUTCHINSON, JR.; J.R. MCALHANEY; F.M. MACK, JR.; ARNOLD F. MARSHALL; J.E. MARSHALL, JR., C.E. REID, JR.; WILL R. SIMPSON, JOHN S. SIMPSON, ROBERT F. SIMPSON; THOMAS BROWN SNODGRASS, JR.; JOHN M. SPRATT; MARSHAL E. WALKER; HUGH M. WHITE, JR.; JOHN M. BELK; JANE NISBET GOODE, R.N. BENCHER, W.O. NISBET, III; PAULINE B. GUNTER; J. MAX MINSON; W.A. MCCORKLE, MARY MCCORKLE; WILLIAM O. NISBET; EUGENIA NISBET WHITE, MARY NISBET PURVIS, E.N. MARTIN; ROBERT M. YODER,

Appellees.

Appeal from the United States District Court
for the District of South Carolina, at Rock Hill
Joseph P. Wilson, Senior District Judge
Western District of Pennsylvania
sitting by designation—(CA-80-2050)

Argued: April 6, 1988 Decided: January 23, 1989

Before WIDENER, HALL, PHILLIPS, MURNAGHAN and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Jerry Jay Bender (H. Clayton Walker, Jr., Jean H. Toal, BELSER, BAKER, BARWICK, RAVENEL, TOAL & BENDER; Don B. Miller, NATIVE AMERICAN RIGHTS FUND; Robert M. Jones, Richard Steele on brief) for Appellant. J. D. Todd, Jr. (Michael J. Giese, Gwendolyn Embler, LEATHERWOOD, WALKER, TODD & MANN; John C. Christie, Jr., J. William Hayton, Patrick J. Roach, Janet F. Satterwhite, Brian A. Runkel, BELL, BOYD & LLOYD; Dan M. Byrd, Jr., Mitchell K. Byrd, BYRD & BYRD; T. Travis Medlock, Attorney General; Kenneth P. Woodington, Assistant Attorney General; James D. St. Clair, P.C., James L. Quarles, III, William F. Lee, Daniel Solomon, HALE & DORR on brief) for Appellees.

BUTZNER, Senior Circuit Judge:

The Supreme Court remanded this case for us to determine whether the claim of the Catawba Indian Tribe to a tract of land is barred by South Carolina statutes of limitations. South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498 (1986). We hold that the statutes of limitations pertaining to disabled persons, sections 15-3-370 and 15-3-40 of the Code of South Carolina, do not bar the tribe from maintaining this action. We also hold that sections 15-3-340 and 15-67-210 bar the tribe from recovering possession and damages from a person who holds and possesses property that has been held and possessed adversely to the tribe's legal title for ten years after the revocation of the tribe's constitution, July 1, 1962, and before the commencement of this action, October 20, 1980, without tacking except by inheritance. We also hold that the statutes of limitations do not bar the tribe from recovering possession and damages from other persons. We therefore affirm in part and reverse in part the district court's grant of summary judgment in favor of the state and all persons in possession and remand the

case for further proceedings on the issues remaining to be tried.

I

The facts that we assume for the purpose of summary judgment are recounted in the majority and dissenting opinions of the Supreme Court [1] and need only be summarized here. In the 1760 Treaty of Pine Hill and the 1763 Treaty of Augusta, the tribe agreed with representatives of the King of England to relinquish its aboriginal territory in exchange for permanent resettlement on a fifteen square mile tract in South Carolina. In the 1840 Treaty of Nation Ford, the tribe transferred its interest in the tract to South Carolina. The United States did not participate in the Treaty of Nation Ford.

In 1959, Congress passed the Catawba Act, 73 Stat. 592, 25 U.S.C. §§ 931-38 (1976), which ultimately led to the revocation of the tribe's constitution on July 1, 1962. As of that date, the tribe's claim to the land it relinquished in 1840 became subject to South Carolina statutes of limitations.

In 1980, the tribe brought suit to recover possession of its land and damages. It asserts that the 1840 Treaty of Nation Ford was void because the United States did not participate in it or consent to the alienation of the tribe's reservation as required by the Indian Nonintercourse Act.[2]

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[1] *See* South Carolina v. Catawba Indian Tribe, 476 U.S. at 500-05 and 511-18 (Blackmun, J., dissenting).

[2] 25 U.S.C. § 177 (1976) (originally enacted as Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138). The Act states in relevant part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

II

The state argues that the tribe was a disabled plaintiff within the meaning of sections 15-3-370 and 15-3-40 from 1840 to 1962, when Congress passed the Catawba Act. Therefore, the state asserts, the tribe had no longer than ten years after 1962, when its disability was lifted, to bring suit. According to the state, since the tribe did not file suit within this period, the statute of limitations bars its claim.[3]

Section 15-3-370 on which the state primarily relies provides:

> Persons under disability.
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> If a person entitled to commence any action for the recovery of real property, or make an entry or defense founded on the title to real property or to rents or services out of the same be, at the time such title shall first descend or accrue, either:
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> (1) Within the age of eighteen years;
>
> (2) Insane; or
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> (3) Imprisoned on a criminal or civil charge or in execution upon conviction of a criminal offense for a term less than life;
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> The time during which such disability shall continue shall not be deemed any portion of the time in this article limited for the commencement of such action or the making of such entry or defense, but such action may be commenced or entry or defense made after the period of ten years and within ten years after the disability shall cease or after the death of the person entitled who shall die under such disability. But such action shall not be commenced or entry or defense made after that period.

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[3] For convenience we refer to all defendants collectively as the state.

Section 15-3-40 recognizes identical disabilities for other causes of action.

The state's position cannot be reconciled with section 15-3-370. The statute applies to only three classes of plaintiffs: infants, the insane, and persons imprisoned for less than their natural lives. Nothing in the statute creates a fourth class of plaintiffs in the tribe's position. Application of the statute obliges us to ascertain the legislature's intent. We cannot read something into the statute that the legislature did not contemplate. Quoting its precedents, the South Carolina Supreme Court has emphasized:

> [C]ourts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the courts to construe, not to make, the laws.

Belk v. Nationwide Mutual Insurance Company, 271 S.C. 24, 27, 244 S.E.2d 744, 746 (1978). We conclude that the Supreme Court of South Carolina would not construe sections 15-3-370 and 15-3-40 to include Indians in the legislatively defined class of disabled persons. Therefore we hold that the disability statutes do not bar the tribe's claim.

III

Section 15-3-340 provides that no action for the recovery of possession of real property shall be brought unless the plaintiff or his predecessor was seized or pos-

sessed of the premises within 10 years before the commencement of the action. Section 15-67-210 creates a presumption of possession if the plaintiff establishes legal title.[4] The tribe acknowledges that it has not been in possession of the tract since 1840, but it maintains that it has Indian title to the tract and that Indian title is legal title within the meaning of section 15-67-210. Therefore, the tribe claims that it is entitled to the presumption of possession prescribed in section 15-67-210 and that the state cannot defeat its claim on the basis of the statute of limitations. The state argues that the tribe is not entitled to the presumption because Indian title is not legal title and that the presumption is inapplicable because the tribe admits it has been out of possession since 1840.

Indian title is a creation of federal law. It is the title given to land occupied by Indians when the United States gained its independence from Great Britain and became the sovereign. Indian title includes a right to possession superior to that incident to fee simple title; where Indian title and fee simple title coexist, the fee simple interest operates merely as a reversionary right to possession which can take effect only when Congress extinguishes the Indian title. Indian title includes the right to exclude all others, including holders of fee simple title, through state law possessory actions such as ejectment and trespass. Indian title cannot be alienated except by Act of Congress; a purported conveyance of the possessory right, even if made by a tribe having such title, is void and no title passes. Except where Congress provides otherwise, claims based on Indian title are not subject to state law defenses such as statutes of limitations, adverse possession, or laches. *See generally* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666-74 (1974); F.

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[4] Sections 15-3-340 and 15-67-210 are quoted in part V of this opinion.

Cohen, *Handbook of Federal Indian Law*, 471-574 (1982 ed.).

The state correctly points out that the 1763 Treaty of Augusta, which is the source of the tribe's Indian title, is not recorded in the Registry of Mesne Conveyances. Relying on this fact, it argues that the tribe's Indian title is not legal title. It insists that legal title is record title; that is, the title that is reflected in the Registry of Mesne Conveyances, and it cites numerous cases from South Carolina and other jurisdictions that refer to legal title and record title synonymously.[5]

Neither South Carolina nor federal law supports the state's argument. The tribe's source of title is recorded, though not in the Registry of Mesne Conveyances. The Treaty of Augusta recites that the Catawbas accepted "the Tract of Land of Fifteen Miles square, a Survey of which by our consent and at our request has been already begun." XI Colonial Records of North Carolina 201-02 (1763). Current South Carolina law affirms that the survey was filed in the office of the Secretary of State. Section 27-15-30 describes the Catawba Indian lands as "situated in the counties of York and Lancaster, within a boundary of fifteen miles square and which are represented in the plat of survey made by Samuel Wiley, dated February 22, 1764 and now on file in the office of the Secretary of State." The state legislature recognized the survey filed in the office of the Secretary of State as a muniment of title, and it is reasonable to assume that the Supreme Court of South Carolina would take similar notice of it.

Our conclusion that lack of recordation in the Registry of Mesne Conveyances does not defeat the tribe's claim is substantiated by sound judicial precedent. The Supe-

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[5] *See, e.g.*, Parr v. Parr, 268 S.C. 58, 231 S.E.2d 695 (1977); Lynch v. Lynch, 236 S.C. 612, 115 S.E.2d 301 (1960); Knight v. Hilton, 224 S.C. 452, 456, 79 S.E.2d 871, 873 (1954).

rior Court of Law sustained a reservation for German immigrants in Hawkins' Devisees v. Arthur, 2 S.C.L. (2 Bay) 195 (1798). In 1730, the King of England offered "bounties of land" to his subjects residing in Germany. Notwithstanding the lack of a recorded deed, the court held that a reservation granted by the crown was superior to a subsequent grant from the state. The plat of a survey entered in the council books was a sufficient muniment of title. 2 S.C.L. (2 Bay) at 202-03. Even though the crown and subsequently the state held the reservation in trust for those persons who had a right of occupancy, the court ruled:

> As to the legal effect of this reservation, there could be no question about it. It amounted to a covenant in law, between the crown and the people, for whose use and benefit it was intended; that the land contained within the boundaries of that plat, should for ever thereafter be appropriated and disposed of, for the use and benefit of the inhabitants of the said town and township and their heirs for ever, and to and for no other intent and purpose whatsoever.

2 S.C.L. (2 Bay) at 203.

In Thomas v. Daniel, 13 S.C.L. (2 McCord) 354, 357 (1823), the Constitutional Court of South Carolina stated that a 1777 treaty between the Cherokees and the state which by "mutual engagements" granted the Indians the right to inhabit certain lands during good behavior "was at least as binding as any contract can be upon sovereign powers." The court held that an estate granted a nation during good behavior "must be an estate forever" and that as long as the Cherokees conformed to the treaty, that is " 'behaved themselves well,' this State was morally bound to permit them to continue in undisturbed possession of the land in question." 13 S.C.L. (2 McCord) at 357. The court then held that a subsequent grant by the state of a part of the reservation to a person who

challenged the Cherokee grant was void. The lack of recordation in the Registry of Mesne Conveyances was no impediment to the Cherokees' title. Although the Constitutional Court did not use the term Indian title, the Indians' "estate forever" had incidents of Indian and legal title.

Current South Carolina law is consistent with the precedent established by *Thomas* and *Hawkins' Devisees.* Recordation in the Registry of Mesne Conveyances, while often a convenient proof of a conveyance, is not essential to establish legal title. In Haithcock v. Haithcock, 123 S.C. 61, 68, 115 S.E. 727, 729 (1923), the Supreme Court of South Carolina approved an instruction that explained to a jury how a claim of title can be established:

> Now, those are the ways in which a man may show title to land: First, by tracing it to the state, under a grant from the state; second, by tracing his title from a common source; third, by showing possession for 20 years in himself and those under whom he claims; and, fourth, by showing 10 years' possession in himself, or by inheritance.

The tribe rests its title on the first way—a grant of a reservation from the crown recognized by the state. Indeed, this grant is the common source of title, because the lessees of land encompassed by the grant and their successors, present occupants, trace title to the same crown reservation through grants made pursuant to the subsequent Treaty of Nation Ford. *See* S.C. Code Ann. §§ 27-15-30, -40, and -50.

Haithcock is also singularly instructive because it applies the statutory presumption on which the tribe relies without requiring proof of recordation or registry. After repeating four ways in which a person can prove title, the trial court correctly charged the jury: "Now, if he has shown that kind of title, then the possession is presumed to have been in the man who shows title in either

one of these four ways." 123 S.C. at 85, 115 S.E. at 734. This presumption of possession is precisely what the tribe claims, having traced its title in the first of the four ways explained by the court.

Since 1698 South Carolina has had recording acts. *See* Epps v. McCallum Realty Co., 139 S.C. 481, 497, 138 S.E. 297, 302 (1927). Notwithstanding this long established provision for recordation, the state has cited no case holding that proof of recording in the Registry of Mesne Conveyances is necessary in order to establish legal title within the meaning of section 15-67-210. This lack of precedent is not surprising because "recording becomes material only when there are double conveyances by the same person, or where there are subsequent creditors." First Carolina Joint Stock Land Bank v. Hudgens, 171 S.C. 18, 21, 171 S.E. 449, 451 (1933). Neither of these situations is involved in this case.

Because the South Carolina legislature recognized in section 27-15-30 that the 1764 survey of Catawba lands was duly filed, we conclude that based on its precedents the Supreme Court of South Carolina would hold that the tribe's claim to legal title for the purpose of invoking the presumption provided in section 15-67-210 is not defeated by lack of recording in the Registry of Mesne Conveyances.

IV

The state also argues that the tribe lacks legal title because Indian title cannot be alienated except by Act of Congress. Without the ability to alienate the tract of fifteen square miles, the state argues the Indians had only equitable, not legal, title.

The state's argument requires us to examine the relationship of the United States as a guardian or trustee for the tribe particularly with respect to the nature of the tribe's Indian title. In Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-68 (1974), the Court suc-

cinctly stated the nation's policy with respect to lands occupied by Indians:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribe was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. . . . The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that "no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." This has remained the policy of the United States to this day.

The original 13 states hold the underlying fee simple title for lands subject to Indian title within their respective borders. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139-43 (1810). Elsewhere the United States holds fee simple title. But this naked fee gives the holder no possessory interest in the land. It constitutes merely a reversionary interest until Congress extinguishes the In-

dian title.[6] Congress's exclusive right to extinguish Indian title results from its trust relationship over Indian tribes. F. Cohen, *Handbook of Federal Indian Law*, 489 (1982 ed.). The federal trust relationship over Indian tribes is derived from the constitutional power conferred on Congress to regulate commerce with the Indian tribes and to make treaties. U.S. Const. art. I, § 8, cl. 3; art. II, § 2, cl. 2; *see* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973); F. Cohen, *Handbook of Federal Indian Law*, 207-12 (1982 ed.).

In Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823), Chief Justice Marshall described a tribe holding Indian title "as the rightful occupants of the soil, with a legal as well as just claim to retain possession of it." Because only the United States could extinguish the tribal right, a conveyance by the tribe without the assent of the United States was inoperative. *Johnson's* principles, as developed in subsequent decisions, indicate that "Indian title represents a perpetual right of use and occupancy (until extinguished) virtually equivalent to a fee interest against all but the United States." F. Cohen, *Handbook of Federal Indian Law* 488, 489 (1982 ed.).

Johnson dealt with aboriginal land, but the Court has applied similar principles to lands that were the subject of grants or reservations by the crown. In Mitchell v. United States, 34 U.S. (9 Peters) 711 (1835), the Court recognized Indian title that originated in royal grants. Speaking of rights conferred on the Indians, the Court said that "it is enough to consider it as a settled principle, that their right of occupancy is considered as

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[6] In 1838, South Carolina transferred its reversionary interest in the tribe's land to lessees of the land. *See* § 27-15-30. This reversionary interest, conditioned upon the United States extinguishing the tribe's Indian title, is so remote that, like a possibility of reverter, it does not rise to the dignity of an estate. *See* Adams v. Chaplin, 10 S.C. Eq. (1 Hill) 265, 277 (1833).

sacred as the fee-simple of the whites." 34 U.S. (9 Peters) at 746.

Again, in United States v. Shoshone Tribe, 304 U.S. 111, 117 (1938), the Court said: "Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title."

In United States v. Tillamooks, 329 U.S. 40, 46 (1946), the Court reiterated: "As against any but the sovereign, original Indian title was accorded the protection of complete ownership; but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will." But termination at will does not leave a tribe wholly unprotected. The Court held:

> The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute. It does not "enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them."

329 U.S. at 54.

In United States v. Kagama, 118 U.S. 375, 381 (1886), the Court observed: "The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character." Perhaps in no other context is this anomaly more apparent than the government's trusteeship of Indian lands. Indian title is not a common garden variety equitable title entirely governed by the precepts of chancery. It is a title derived from aboriginal possession subject to the right of discovery and con-

quest and in many instances, as here, dignified by royal grant. "The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all the States, including the original 13." *Oneida*, 414 U.S. at 670. The Court has instructed that the Indians' right of occupancy is to be "as securely safeguarded as is fee simple absolute title." *Shoshone*, 304 U.S. at 117. Indian title confers on a tribe occupying the soil "a legal as well as just claim to retain possession of it." *Johnson*, 21 U.S. (8 Wheat.) at 574. A legal claim presupposes a legal title. Chief Justice Marshall did not speak of an equitable claim based on equitable title. These precedents establish that as a matter of federal law, for the purpose of recovering possession of real property and damages against any defendant other than the United States, Indian title is equivalent to fee simple absolute title. It is legal title.

The argument that the Catawbas have equitable title precluding the tribe from invoking the presumption afforded by section 15-67-210 conflicts with the policy of the United States and the Nonintercourse Act. This policy and the Act protect Indian tribes in their rightful occupancy of their lands. To use the trusteeship created by the Constitution and implemented by the Act to defeat a tribe's right of occupancy would indeed be ironic and unjust. Serious issues involving the application of the Supremacy Clause and the Equal Protection Clause would arise if a state in violation of the Nonintercourse Act were to dispossess a tribe and then defeat a tribe's legal claim to possession by denominating its title as equitable. Fortunately, we need not address these constitutional issues because we have no doubt that the Supreme Court of South Carolina, taking cognizance of the federal precedents and its own precedents, would hold that section 15-67-210 entitles the tribe to the presumption of possession.

V

Having determined that the tribe's Indian title is legal title within the context of section 15-67-210, we must next decide the effect of the statutory presumption of possession on the rights of the tribe and the rights of the present occupants.

Standing alone South Carolina's 10-year statute of limitations would bar the tribe's claim.[7] This is the basis of the district court's opinion, and it is the position urged by the state. Section 15-3-340 provides:

> No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action.

But the 10-year statute cannot be read in isolation. It must be read in conjunction with section 15-67-210. This section provides:

> In every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law. The occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action.

This section is applicable to the tribe's claim. It brought an action to recover possession of real property. It has legal title to the property. Consequently, it is "presumed

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[7] South Carolina also recognizes a 20-year presumption of grant doctrine and a 40-year statute of repose, § 15-3-330. But these are not an issue in this case.

to have been possessed thereof within the time required by law." What time? The 10 years specified in section 15-3-340 that is a prerequisite for bringing an action for the recovery of real property. Therefore, the plain text of sections 15-3-340 and 15-67-210 authorizes the tribe to maintain its action to recover possession of their tribal lands.

The state, however, contends that inasmuch as the tribe acknowledges that it has not been in posession of the land since 1840, this judicial admission precludes it from relying on the presumption. It relies on the axiom that a presumption must give way to reality when a fact is shown, and for this proposition it cites cases that do not discuss section 15-67-210.[8]

The difficulties with the state's argument are several. The tribe never admitted that it is not entitled to the presumption of possession. It has steadfastly maintained that its legal title enables it to claim possession for the necessary 10 years to maintain this action.

Section 15-67-210 does not require a plaintiff to show both legal title and possession, and we decline to place such a gloss on the statute. True, the presumption of possession is not conclusive. It can be rebutted, and the statute expressly states how it can be rebutted. Rebuttal may be accomplished according to the terms of the statute by showing "such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action." The statute does not allow rebuttal by simply showing that the plaintiff has not been in possession or that the plaintiff has admitted lack of possession.

The tribe's position is sustained by Love v. Turner, 71 S.C. 322, 51 S.E. 101 (1905). In that case the plaintiff

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[8] *See, e.g.*, Galpin v. Page, 85 U.S. 350, 366 (1873); Fouche v. Royal Indemnity Co. of New York, 217 S.C. 147, 60 S.E.2d 73 (1950); Kaylor v. Hiller, 77 S.C. 393, 58 S.E.2d 2 (1907).

claimed title to a 100-acre tract by a grant from the state, subsequent deeds, and a will. The defendant denied the plaintiff's title and pled the statute of limitations and adverse possession, claiming title through a sheriff's deed and subsequent deeds. Judgment was entered for the plaintiff, and the defendant assigned error to the trial court's refusal to give the following charge:

> If neither the plaintiff nor any one under whom he claims title to the land in dispute has been seized or possessed of the land in question within ten years before the alleged acts of trespass were committed, then the plaintiff cannot recover.

71 S.C. at 330, 51 S.E. at 104. Ruling on this assignment of error, the Supreme Court said:

> If plaintiff had the legal title, he was presumed to be possessed of the land within the ten years, and it was necessary to rebut this presumption by proof of continuous adverse possession of some other person for ten years. The request embodying the foregoing proposiiton was, therefore, properly refused. (citations omitted)

71 S.C. at 330, 51 S.E. at 104. It should be noted that the charge, which the defendants sought and the court properly refused, is similar to the proposition the state asserts in the instant case. The court's ruling reflects the position of the tribe.

Similarly in Crotwell v. Whitney, 229 S.C. 213, 92 S.E.2d 473 (1958), the Court applied the predecessor of section 15-67-210 without the gloss that the state now seeks. In *Crotwell*, the plaintiffs founded their claim to title upon a deed executed by their father. The defendants claimed under a tax deed, adverse possession, presumption of a grant, and laches. The trial court entered judgment for the plaintiffs, and the Supreme Court affirmed, holding:

> Plaintiffs having established their legal title to the premises, appellant Whitney's claim of title by adverse possession required proof of actual, open, notorious, hostile, continuous and exclusive possession by him, or by one or more persons through whom he claimed, for the full statutory period of ten years, without tacking of possession except by descent cast.

229 S.C. at 220-21, 92 S.E.2d at 477. Again, the Court's construction of the statute is precisely that which the tribe asserts should be applied to its claim.

In *Crotwell*, the Court cited as authority Haithcock v. Haithcock, 123 S.C. 61, 115 S.E. 727 (1923), a case on which both parties rely. The plaintiff in *Haithcock* alleged title to 37 acres. The defenses were a general denial, adverse possession for 35 years, and the statute of limitations for 10, 20, and 30 years. The plaintiff prevailed, and the defendant appealed, assigning numerous errors. The Supreme Court affirmed. It held that the charge was correct and ordered that it be reported. Thus, the precedent established by the case is set forth in the charge.

The trial court explained to the jury that a man may obtain title by grant. It said:

> The title to all land was originally in the state, in the sovereign, or, prior to the Revolution, in the crown of England—and that is called the source of all title, in the state. So the first way in which a man may establish title to land is by showing a grant from the state, the source of all title, to himself, or a grant from the state to some one, and then by successive deeds, down to him. That is called a perfect legal paper title, a deed to himself, and then tracing back to some one else and to some one else, until it reaches the state, and then a grant from the state to the first holder of the land.

123 S.C. at 66-67, 115 S.E. at 729. This is precisely the way the tribe obtained title—by a grant from the English Crown before the Revolution. By well estabilshed law, and as a matter of fact, South Carolina recognized the grant.

The *Haithcock* trial court then explained how a defendant can defeat title. As part of its charge it explained the 10-year statute of limitations now codified as section 15-3-340 upon which the state relies. The state quotes the following extract of the charge to establish its position:

> [The defendant] may defeat the plaintiff's title by showing that the plaintiff himself has not been in possession for 10 years next before the beginning of this action; for, gentlemen, the law makes possession a very strong factor in the question of title to real estate, and it says that if a man stays out of possession for 10 years, asserts no claim to a piece of property, does not occupy it by himself or tenants, and lets that situation remain for 10 years, the law says that it is too late for him to come in, that he is barred by the statute of limitations, and having slept on his rights for as long as 10 years, he cannot come in afterwards and assert his rights.

123 S.C. at 69, 115 S.E. at 729. Taken in isolation out of context this extract from the charge would seem to support the state. But it does not. For in the next paragraph of the charge, which the state omitted to quote, the Court explained that possession could be established by the presumption that is now codified as section 15-67-210 upon which the tribe relies. The Court said:

> Now, what is possession of land? I charge you that, under the law, if one shows paper title—a deed or will or legal paper title of any kind, to land—then the law presumes that he was in possession of that land, and that his title gives him the

> possession; that is, the possession follows the title. Perhaps I had better read you what the statute says on that question. Now, pay attention to this, because this is the act of the Legislature, and is the law that governs us all: "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for 10 years before the commencement of such action." Code Civ. Proc. 1912, § 126.
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> In other words, gentlemen, the law presumes, where a man shows title, he need not be on the land, he need not be in 10 miles of the land, if he shows perfect legal title, then the law says the possession follows the title, and he is deemed to be in possession if he show a good legal title to the land, although he may never have seen the land; and that presumption holds unless, and until, some one else goes on the land and occupies and holds it adversely to that right for 10 consecutive years.

123 S.C. at 69-70, 115 S.E. at 729-30. It is quite apparent that the trial court's charge, approved by the Supreme Court of South Carolina, expressly refutes the state's argument. It is difficult to envision how a plaintiff who has "not been in 10 miles of the land" or who "may never have seen the land" could satisfy the state's argument that he must also be in possession of the land for 10 years. The correct analysis of the law, as the trial court lucidly explained in *Haithcock*, is that legal title without actual possession will satisfy the statutory presumption of possession.

We conclude that the tribe is entitled to invoke the presumption set forth in section 15-67-220, and its claim is not barred because it acknowledged that it did not actually possess the land for the 10 years specified in section 15-3-340.

VI

The second sentence of section 15-67-210 defines both the status and the rights of the present occupants. The first clause provides: "The occupation of such premises by any other person shall be deemed to have been under and in subordination of the legal title . . . ." This clause without more would defeat the state's claim, for permissive possession is not adverse. *Haithcock*, 123 S.C. at 84, 115 S.E. at 734. But the clause is subject to this important proviso, "unless it appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action." This proviso would appear to doom the tribe's claim, because this action was not commenced until 1980. But South Carolina's tacking doctrine forestalls this conclusion.

The doctrine is succinctly stated by David H. Means, Professor of Law, University of South Carolina, as follows:

> The rule in this State, contrary to the view of the overwhelming majority of jurisdictions, is that even though there be privity by deed or devise between successive adverse occupants of land, the possession of such occupants cannot be tacked to make out title by adverse possession under the statute of limitations. Such tacking has been permitted, however, in the case of a continuation by the heir of the possession of the ancestor dying intestate. (footnotes omitted)

D. Means, Survey of South Carolina Law: Property, 10 S.C.L.Q. 90 (1957).

Ellen v. Ellen, 16 S.C. 132, 141 (1881), explains the reason tacking is prohibited:

> [A]n adverse possessor is a trespasser from the beginning to the end. His possession begins in trespass, and so continues until it ripens into a right at the end of the statutory period of ten years. During this time he has nothing that he can convey; nor can his possession be tacked with that of his grantee so as to defeat the title of the true owner.

In contrast, an heir can tack the possession of his ancestor dying intestate "upon the theory that there is no new entry or trespass, but that the possession of the ancestor is cast by operation of law upon the heir, hence there is no break in the continuity of possession." Burnett v. Crawford, 50 S.C. 161, 166, 27 S.E. 645, 647 (1897).[9]

South Carolina's prohibition against tacking applies to both a plaintiff who seeks to establish title by 10 years of adverse possession and a defendant who asserts the 10-year statute of limitations, section 15-3-340, as a defense. *See, e.g., Haithcock*, 123 S.C. at 75, 115 S.E. at 731 (plaintiff); and *Crotwell*, 229 S.C. at 221-22, 92 S.E.2d at 477-78 (defendant).

Application of South Carolina's tacking doctrine precludes the tribe from prevailing against a person who owns property that has been held adversely for 10 years in the relevant period of time without tacking except by inheritance. Conversely, a person who must rely on prohibited tacking cannot prevail against the tribe.

VII

In view of the dissent's concern, a brief explanation of the district court's jurisdiction is appropriate. In para-

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[9] Tacking is permitted when a claim or defense is founded on the 20-year presumption of a grant or on the 40-year statute of repose. D. Means, Survey of South Carolina Law: Property, 10 S.C.L.Q. 90, n.2 (1957).

graph 2 of its complaint, the tribe invoked jurisdiction pursuant to 8 U.S.C. § 1331 (federal question), § 1337 (an action or proceeding arising under an act of Congress regulating commerce), and § 1362 (claim asserted "by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."). In paragraph 3, the tribe alleged that its claims for relief arise under the Treaty of Pine Tree Hill, the Treaty of Augusta, Article I, Section 8 and Article VI of the Constitution (Commerce Clause and Supremacy Clause), and 25 U.S.C. § 177 (the Indian Nonintercourse Act).

On the basis of the facts assumed for the purpose of considering the summary judgment motion, which the state filed, there is no suggestion that the district court would have lacked jurisdiction to decide the tribe's claim if the tribe had brought its action before the passage of the Catawba Act in 1962. The question, therefore, is to what extent Congress intended the Catawba Act to affect the tribe's claim. In *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. at 510, the Supreme Court answered this question, saying:

> We do not accept petitioners' argument that the Catawba Act immediately extinguished any claim that the Tribe had before the statute became effective. Rather, we assume that the status of the claim remained exactly the same immediately before and immediately after the effective date of the Act, but that the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction.

The Court's explanation establishes that, with the exception of the application of the state statute of limitation, Congress intended that every element of the tribe's claim "remained exactly the same immediately before and im-

mediately after the effective date of the Act." The tribe's capacity to invoke federal jurisdiction pursuant to 28 U.S.C. §§ 1337 and 1362 was not defeated by the enactment of the Catawba Act.

Section 1331 provides another independent basis for jurisdiction. This section gives district courts jurisdiction of "all civil actions arising under the Constitution, laws, or treaties of the United States." The tribe's complaint alleged a right of occupancy under treaties with the British Crown that were implemented by the Nonintercourse Act. These allegations of Indian title sufficed to satisfy the well-pleaded complaint rule.

The tribe's allegations distinguished the case from Taylor v. Anderson, 234 U.S. 74 (1914), where federal jurisdiction was lacking. In that case the plaintiffs did not allege Indian title, but only that the defendant's title was void because of an Act restricting alienation of Choctaw and Chickasaw allotments. The distinction is fully explained in Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974), which held that a complaint alleging right of occupancy based on Indian or aboriginal title protected by the Nonintercourse Act established jurisdiction under section 1331. *Oneida* explained that the right to possession under a claim of Indian title is based on federal law. Therefore, the federal issue does not arise solely in anticipation of a defense. *Oneida* also reiterated that Indian title is a matter of federal law and that it can be extinguished only with federal consent. 414 U.S. at 666-74. In *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. at 510, the Court held that the Catawba Act did not extinguish the tribe's claim of Indian title.

Many federal issues remain to be tried on remand, and the tribe may ultimately lose its case. Nevertheless, here, as in *Oneida*, the tribe's assertion of a federal right of occupancy governed by federal law is not "so devoid of merit as not to involve a federal controversy within the

jurisdiction of the district court." 414 U.S. at 666. The principles explained in *Oneida* demonstrate that the tribe's complaint did not run afoul of the well-pleaded complaint rule.

We conclude that sections 1331, 1337, and 1362, and each of them, confer jurisdiction on the district court. Moreover, the Supreme Court has definitively decided the effect that Congress intended the Catawba Act to have on the tribe's claim. On this issue its decision is final. We are not at liberty to attribute to Congress a different intention in order to question jurisdiction. The Supreme Court has issued its mandate directing us to decide the issue pertaining to the state statute of limitations. *See* 476 U.S. at 511. Sound principles of appellate procedure counsel compliance with the Court's mandate. *See* Skillern's Ex'rs v. May's Ex'rs, 10 U.S. (6 Cranch) 267 (1810).

VIII

We hold that sections 15-3-340 and 15-67-210 bar the tribe's claim against each person who holds and possesses property that has been held and possessed adversely for 10 years after July 1, 1962, and before October 20, 1980, without tacking except by inheritance, in accordance with South Carolina's tacking doctrine. The statutes of limitations do not bar the tribe's claim against other persons. "Person" includes joint tenants, tenants in common, partnerships, associations, and corporations.

The judgment of the district court is affirmed in part and reversed in part, and this case is remanded for further proceedings consistent with this opinion. Each party shall bear its own costs.

WIDENER, Circuit Judge, dissenting:

Although I join in Judge Hall's dissent, I write separately to add a few words.

First, the Supreme Court has not hesitated to dismiss actions on grounds akin to jurisdictional even after prolonged litigation. In *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363 (1973), the Court dismissed the action, finding that the defendant's actions were immune from the antitrust laws. The dismissal took place some eleven years after the suit began and seven years after the Supreme Court had the opportunity to address the same issue and did not.[1] *Hughes Tool Co.*, 409 U.S. at 392 (Chief Justice Burger dissenting). Merely because the Catawbas' suit has been in the court system for some time and the Supreme Court has addressed the suit without explicitly considering jurisdiction is no reason to shy away from the jurisdictional issue. *Hagans v. Lavine*, 415 U.S. 528, 534-35 n.5 (1974).

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[1] In 1964, the Supreme Court granted certiorari, but, after oral argument and briefing, which included the issues upon which the case was ultimately decided, in 1965 dismissed the writ as improvidently granted. *Hughes Tool Co.*, 409 U.S. at 391-392. The Court nevertheless did not hesitate to dismiss the suit on the same grounds in 1973 when the case was there a second time.

I have used the words "akin to jurisdictional" in an abundance of caution and out of deference to the Court in *Hughes Tool* which stated that the Federal Aviation Act did not "completely replace" the antitrust laws. Of course if *Hughes Tool* is not purely jurisdictional, it is an even stronger precedent for my point of view than a case decided on a question relating purely to subject matter jurisdiction. In this respect, I note that the Second Circuit, in an earlier appeal in this same case, *Trans World Airlines v. Hughes*, 332 F.2d 602 (2d Cir. 1964), treated the question as jurisdictional and that Sullivan in his treatise, *Antitrust*, West 1977, p. 746, et seq, considers the question one of primary jurisdiction. I also note that the Court in *Hughes Tool*, 409 U.S. 364, 365, n. 1, as precedent for proceeding as it did, relied on *Indiana v. Chase National Bank*, 314 U.S. 63 (1941), in which case a question of jurisdiction which had been presented to the Court, but not decided, was later decided upon subsequent consideration by the Court.

Second, I see no reason why the presumption of possession relied upon by the Catawbas to save their action from South Carolina's statute of limitations is not rebutted by the Catawbas' judicial admission that they had been out of possession for 140 years when they filed suit. Although there are no South Carolina cases, similar presumptions in other States have been subject to rebuttal. See *Beneficial Life Ins. Co. v. Wakamatsu*, 270 P.2d 830 (Idaho 1954). In *Kirkman v. Holland*, 51 S.E. 856, 857 (N.C. 1905), the court would not even consider the presumption of possession arising from a statute indistinguishable from the one at issue here, given a judicial admission rebutting it. In South Carolina, the "allegations, statements or admissions contained in a pleading are conclusive as against the pleader." *Elrod v. All*, 134 S.E.2d 410, 416 (S.C. 1964). In their complaint, the Catawbas admit being out of possession since 1840. The presumption of possession in favor of the Catawbas, assuming arguendo that they have "legal title," has therefore been rebutted. The majority's approach, not permitting the defendants to rebut the presumption of possession once legal title is established (except by adverse possession), defeats the very purpose of South Carolina's statute of limitations by allowing a stale claim. If South Carolina had intended to give parties who could establish "legal title" *no* time limit to file suit, it could have done so instead of merely creating a presumption of possession. Civil presumptions in South Carolina are usually rebuttable. *Palm v. General Painting Co., Inc.*, 370 S.E.2d 463, 466 (S.C. 1988) (presumption of legitimacy when born in wedlock); *McDowell v. S.C. Dept. of Social Services*, 370 S.E.2d 878, 880 (S.C. App. 1987) (presumption of gift to a close relative); *Touchberry v. City of Florence*, 367 S.E.2d 149, 150 (S.C. 1988) (presumption that public contract not enforceable by an individual as third party beneficiary); *Mathias v. Hicks*, 363 S.E.2d 914, 916 (S.C. App. 1987) (presumption that collateral is worth indebtedness);

Woods v. Bivens, 354 S.E.2d 909, 911 (S.C. 1987) (presumption that possession of one tenant in common is possession by all); *Estate of Mason v. Mason*, 346 S.E.2d 28, 31 (S.C. App. 1986) (presumption that a missing will was destroyed by testator); *McBride v. Atlantic Coast Line R. Co.*, 138 S.E. 803, 807 (S.C. 1927) (presumption that when railroad fails to use warning signals that the failure is proximate cause of injury); *McMillan v. General American Life Ins. Co.*, 9 S.E.2d 562, 574-575 (S.C. 1940) (presumption against suicide). Logic and South Carolina precedent require, I think, the conclusion that the presumption of possession created in S.C. Code § 15-67-210 is also rebuttable and has been rebutted in this case by the admission of the Catawbas.

Judge Hall joins in this dissent.

HALL, Circuit Judge, dissenting:

As an intellectual exercise, I disagree with the majority's analysis of South Carolina law as it relates to the Catawbas' duty to assert their claim within ten years of the Tribe's 1962 dissolution. In my view, either the removal of disability provision of S.C. Code § 15-3-370 [1] or the more general statute of limitations in S.C. Code

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[1] The majority mechanically rejects any role for § 15-3-370 on the grounds that it specifically applies only to minors, mental incompetents, and prisoners. The majority fails to recognize, however, that the statute was broadly written to cover all classes of citizenry normally assumed to be under a legal disability. See 51 *Am. Jur. 2d*, Limitations of Action §§ 178 *et seq.* Although the South Carolina legislature did not expressly provide for Indians, it clearly did intend that any South Carolina citizen whose legal status excused a timely assertion of legal rights would pursue those rights within ten years of a change in that status. The Catawbas' action, in my view, falls within the broad intent of the statute by analogy and should be barred for that reason.

§ 15-3-340 [2] would effectively bar the Catawbas' instant possessory action. My principle objection to the majority's decision is more fundamental, however. In light of the Supreme Court's discussion of the effect of the

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[2] In reasoning that Indian title is legal title conferring a presumption of possession under § 15-67-210 and, thereby defeating the ten-year statute of limitations provided in § 15-3-340, the majority has permitted an exception to devour the rule. South Carolina has clearly sought to impose finality in potential land disputes by requiring a party out of actual possession to bring an action within ten years. The only exception to that general rule is the presumption of possession accorded the holders of "legal title" by § 15-67-210. Logically, however, "legal title" must be some mechanism that would give adequate notice to another claimant that the statute of limitations is unavailable.

South Carolina law unquestionably treats recordable titles with special deference. South Carolina Code § 15-3-380 specifically provides that a chain of title "by virtue of a written instrument" extending for forty years "shall be deemed valid against the world." In my view, the presumption of possession in § 15-67-210 is a product of the same rationale that produced § 15-3-380. Although it has not been expressly asserted on appeal, I am convinced that the present South Carolina landholders, who undoubtedly have chains of title exceeding forty years, are entitled to prevail under 15-3-380 and to defeat the presumption of possession in § 15-67-210.

In reaching a contrary position, the majority has fallen into the morass created by careless language in older South Carolina property law decisions such as Haithcock v. Haithcock, 123 S.C. 61, 115 S.E. 727 (1923). In *Haithcock*, the term "title" is alternatively used to refer to a superior possessory interest as well as the legal indicia of that interest. Significantly, however, the court in *Haithcock* discussed the presumption of possession only in connection with a "paper title"—a recordable instrument. 123 S.C. at 69-70, 115 S.E. at 729-730. By focusing instead upon the four ways upon which a possessory interest in land can be validly obtained in South Carolina and granting to each a presumption of possession, the majority has created a statute of limitations that doesn't limit anyone except parties who could not prevail in any event. I find this interpretation of the South Carolina statute utterly irrational. I also find the failure to address § 15-3-380 particularly troubling in light of the extensive treatment of South Carolina law attempted in the majority opinion.

Catawba Indian Tribe Division of Assets Act, 25 U.S.C. §§ 931-938 in *South Carolina v. Catawba Indian Tribe*, —— U.S. ——, 106 S.Ct. 2039 (1986), and the well-established jurisdictional doctrine of *Taylor v. Anderson*, 234 U.S. 74 (1914), I am persuaded that federal jurisdiction over the Catawbas' claim has never existed.

In the original complaint, the Catawbas sought to invoke federal jurisdiction on three bases: (1) federal question pursuant to 28 U.S.C. § 1331 [jurisdiction over "all civil actions arising under the Constitution, laws or treaties of the United States"]; (2) Indian tribe pursuant to 28 U.S.C. § 1362 [jurisdiction over "all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws or treaties of the United States"]; and (3) regulation of commerce pursuant to 28 U.S.C. § 1337 [jurisdiction over a civil action arising under "any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies". The last theory was advanced to support the allegation that an 1840 conveyance of the land at issue by the Catawbas was achieved in contravention of the 1799 Indian Nonintercourse Act, 25 U.S.C. § 177. The Supreme Court's decision in *Catawba* leaves no doubt, however, that neither section 1362 nor 1337 was ever a legitimate ground for federal litigation.

In *Catawba*, the Court quoted prominently from section 5 of the Catawba Act, which provides that:

> The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians shall be

> inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States.

Based on that provision, the Court clearly concluded that after the 1962 effective date of the Catawba Act, the trust relationship between the United States and the Catawbas was dissolved, the federal statutory protection for Indians was no longer applicable to them and the laws of South Carolina controlled their right, if any, to the land claimed in this case. *Catawba*, 106 S.Ct. at 2043.[3]

It is now beyond question that when the plaintiffs/appellees initiated their action in 1980 they were not Indians as that term is used in federal law. At most, the appellees are a collection of South Carolina residents of Indian descent who are successors in interest to a defunct tribe—a point expressly acknowledged by the Supreme Court when it described appellees as "a nonprofit corporation organized under the laws of South Carolina in 1975." 106 S.Ct. at 2040 n.2. The essential jurisdictional prerequisite for 28 U.S.C. § 1362—an "Indian tribe . . . duly recognized by the Secretary of the Interior. . . ." was plainly absent.[4] Similarly, the dis-

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[3] The Court's reasoning was supported prominently by citation to cases such as Larkin v. Paugh, 276 U.S. 431 (1928) (termination of trust relationship rendered consideration of land disputes appropriate in state courts, "the land being there.") *Catawba*, 106 S.Ct. 2045 n.19.

[4] The unavailability of section 1362 has particular significance in light of the fact that the State of South Carolina is a named defendant. The statute abrogates a state's normally applicable immunity under the eleventh amendment. LacCourte Oreilles Band, etc. v. State of Wisconsin, 595 F. Supp. 1077 (W.D. Wisc. 1984). If section 1362 is, as I believe, inapplicable, the Catawbas' action against the State is constitutionally suspect.

solution of the Catawbas in 1962 undermined the jurisdictional validity of the Nonintercourse Act claim asserted under 28 U.S.C. § 1337. The continued existence of a trust relationship is required in order to invoke a Nonintercourse Act claim in federal court. *See e.g., Joint Tribal Council of Passamoquoddy Tribe v. Morton*, 520 F.2d 370 (1975).

Without sections 1362 or 1337, the only remaining ground on which appelles might assert federal jurisdiction is the general federal question provision of section 1331. A review of the history of this case reveals, however, that jurisdiction on that theory runs afoul of the long-established rule that a federal question must appear on the face of a "well-pleaded complaint." See Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d § 3566. The Catawbas' initial complaint, which asserted purely state claims for ejectment and trespass damages, failed that test. Indeed, federal law did not enter this case until it was belatedly asserted by the Catawbas in response to the defendants' attempted reliance upon South Carolina statutes of limitation.

The Supreme Court in *Taylor, supra*, unhesitatingly applied the well-pleaded complaint rule to defeat a possessory land claim advanced by individual Indians. The Indians had alleged that certain defendants were in possession of Indian land in violation of "legislation of Congress restricting the alienation of lands allotted to the Choctaw and Chickasaw Indians." 234 U.S. at 74-75. The Court reasoned that federal jurisdiction was lacking since the action was one for ejectment and the allegations involving federal law were "neither essential nor appropriate." *Id.* In approving of the result in *Taylor*, modern commentators have agreed that an action for the possession of land does not arise under federal law simply because there is a potential federal issue in the chain of title. Wright, Miller & Cooper, *Id.*, *see also* F. Cohen, *Handbook of Federal Indian Law*, 312 (1982 ed.).

The subsequent decision in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), recognized an exception to the *Taylor* rule for possessory actions brought by an Indian tribe in a current trust relationship with the federal government. In circumstances where the land title is under "continuous" federal protection, the Court reasoned that a right of possession necessarily raises a federal question. *In.* at 676-677. I see nothing in *Oneida*, however, that would extend its reach to situations where there is no trust relationship that would indicate a "continuing federal interest" in the land of dispute. 414 U.S. at 683, Rehnquist, J., concurring.[5] It follows, therefore, that the Catawbas, who unquestionably had no trust relationship with the United States, have asserted what must be seen as a purely state law cause of action falling squarely within the jurisdictional limitations of *Taylor v. Anderson.*

I, of course, recognize that it is late in the day to raise a jurisdictional objection to this prolonged litigation. It is also true that this Court, as did the district court below and the Supreme Court above, has addressed this case on the merits without examining the jurisdictional implications. This omission is in large part a result of the parties' failure to raise the issue. It cannot, however, relieve us of our fundamental responsibility to insure that we decide only those cases that fall within our lawful authority as a court of limited jurisdiction.

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[5] Certainly the Supreme Court did not intend for its decision to "disturb the well-pleaded complaint rule of Taylor v. Anderson," *Oneida*, 414 U.S. at 677. Lower courts have also recognized that *Oneida* left *Taylor* intact. See State of New York v. White, 528 F.2d 336, 339 (2d Cir. 1975) (concluding that *Oneida* was a "narrow ruling" based on the "unique relationship" between the federal government and Indian nations). In the present case, the "unique relationionship" had obviously been terminated well before the litigation began. It is a clear failure to appreciate the inteplay of *Taylor* and *Oneida*, as well as a serious misreading of *Catawba* that dooms the effort to assert jurisdiction in section VII of the majority opinion.

We certainly cannot assume that the Supreme Court's treatment of the merits in *Catawba* or even its remand of the state law issues to this Court amounts to a finding of jurisdiction. Jurisdiction was not specifically addressed in *Catawba*. Moreover, the Court itself has acknowledged on other occasions that the passing of a jurisdictional question *sub silentio* does not resolve that issue. *Hagan v. Lavine*, 415 U.S. 528, 534-35 n.5 (1974). The existence of jurisdiction remains open for consideration when properly raised.

The implications of the majority's decision are profound. The ownership interests of over 25,000 South Carolina landowners will be impaired and in many cases overturned notwithstanding chains of title of previously unquestioned validity. If South Carolina law, which the Supreme Court has recognized as controlling, compels that result then so be it. It offends reason and justice, however, for the assessment of South Carolina law to be conducted by a court without jurisdiction and with no special familiarity with the relevant law.[6] I am persuaded that, today, we are such a court. Accordingly, I respectfully dissent from the majority's resolution of this matter.

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[6] The Supreme Court's remand of the state law issue in *Catawba* was based upon the traditional deference accorded the Courts of Appeals and the district courts to resolve state law issues arising within their jurisdictions. *E.g.* Propper v. Clark, 337 U.S. 472 (1949). That deference, however, is rooted in the assumption that at least some of the district and appellate judges involved are usually from the state where the legal question has arisen and, thus, are trained in that state's law. That situation is not present here where neither the district judge who originally heard this case nor any member of this appellate court is a South Carolina jurist. By bringing this case in federal court and proceeding against a broad range of commercial defendants thereby compelling the recusal of many members of this Court, the Catawbas have managed to have their state law case decided by a court with substantially reduced familiarity with South Carolina law.

EXHIBIT B

The District Court Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 80-2050

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, also known as the CATAWBA NATION OF SOUTH CAROLINA,
Plaintiff

v.

STATE OF SOUTH CAROLINA, *et al.*,
Defendants

[Filed June 14, 1982]

MEMORANDUM AND ORDER GRANTING
SUMMARY JUDGMENT

INTRODUCTORY REVIEW

The complaint in this civil action was filed October 28, 1980. This suit was brought by the Catawba Indian Tribe of South Carolina for possession of approximately one hundred forty thousand (140,000) acres of land in York, Lancaster and Chester Counties, South Carolina, which plaintiff maintains were illegally taken from it by the Treaty of Nation Ford with the State of South Carolina in 1840. It also seeks historic trespass damages for the period of its dispossession.

Plaintiff claims that the subject lands were reserved as an Indian reservation in treaties with the King of England in 1760 and 1763. Upon the adoption of the Constitution and the Indian Nonintercourse Act of 1790, Indian affairs came under the exclusive province of the

Federal Government. Thus, plaintiff asserts that because the United States did not participate in or subsequently ratify the 1840 Treaty with South Carolina, the transaction is void, conveyed no legal title and the subject lands remain an Indian reservation to this day. Plaintiff bases its claim upon the treaties with the Crown, the United States Constitution, and the Nonintercourse Act, which is presently codified at 25 U.S.C. § 177.

It is noticed in the complaint that the Catawba Tribe of South Carolina is duly organized under the laws of the State of South Carolina as a nonprofit corporation. Plaintiff Catawba Indian Tribe, Inc., is the successor to the Catawba Indian Tribe which was a signatory to the Treaty of Pine Tree Hill in 1760 and the Treaty of Augusta in 1763.

In this lawsuit, plaintiff has joined approximately ninety defendants, which include the State of South Carolina, other public entities, corporations and individuals. Those defendants are sued both individually and as representatives of all other persons who assert an interest in any portion of the subject lands. Plaintiff filed a motion for class certification asserting that the class will total at least 27,000 persons.

Upon the filing of this case all the District Judges for the District of South Carolina recused themselves. Thereafter this civil action was assigned to the undersigned by special designation. In the meantime, Chief Judge Charles E. Simons, Jr., entered an Order upon the motion of counsel for plaintiff extending the time to answer or otherwise plead to the complaint for 20 days following an Order disposing of plaintiff's motion to certify the defendant class. In the meantime many appearances by counsel were entered on behalf of the various defendants. Thereafter a status conference was held before the undersigned on February 18, 1981. Pursuant to the understanding reached with counsel, a schedule with respect to filing 12(b) motions and replies thereto was indicated

in my Order of April 15, 1981, which in turn stayed consideration of motions for class certification and the filing of any motions by plaintiff pursuant to Rule 56. Thereafter on June 19, 1981, defendants filed a motion to dismiss accompanied by a brief in support of its motion as well as an appendix to the memorandum in support of the motion to dismiss. Plaintiff filed a response to defendants' motion to dismiss on August 20, 1981, together with appendix exhibits in response to defendants' motion to dismiss.

A full hearing on defendants' dismissal motion was held at Rock Hill on October 28, 1981. It is to be observed in this case that able and experienced counsel represent these parties. The oral argument and written documents and especially briefs exhibit the high professional learning and aptitude on the part of the lawyers in this case. They have been amiable and considerate among themselves and with the Court.

It is to be observed that at the October hearing a wide range of oral argument and discussion took place in open court. It developed that although the dismissal motion was filed under Rule 12(b)(6), that is, (on the ground that the complaint failed to state a claim upon which relief can be granted), matters outside the pleadings were discussed and considered, that is, the appendices accompanying the briefs of each counsel which were not excluded by the Court. Thus the motion was to be treated as a motion for summary judgment and disposed of as provided in Rule 56.

Counsel for South Carolina and for the other defendants from the inception of this lawsuit have contended that the statute enacted by Congress in 1959 referred to as both the Catawba Termination Act and the Catawba Tribe of South Carolina Division of Assets Act, 25 U.S.C. 931 et seq., must be given effect by this Court, and when the statute is applied this case must be dismissed.

Apparently because of the wide ranging discussion and oral argument at the October 28th hearing, defendants' counsel on November 25, 1981, filed a motion for entry of a supplemental order together with a brief in support thereof, as well as the proposed supplemental order. On December 7, 1981, plaintiff's counsel filed a motion in response to defendants' motion for the supplemental order in which it was indicated that plaintiff had no objection to the supplemental order as suggested by defendants. Whereupon the following order was entered by this Court on January 15, 1981:

"SUPPLEMENTAL ORDER

"*1.* On or before February 26, 1982, the plaintiff and the moving defendants each shall submit proposed orders for the resolution of the motion for summary judgment. The proposed orders shall address only the issues previously briefed and argued by the parties before this Court concerning the consequences of the 1959 legislation referred to by the defendants as the Catawba Termination Act.

"*2.* The Court understands that accompanying defendants' brief in support of its Motion To Dismiss it filed appendices with Exhibits 1 through 39 inclusive, and opposing defendants' motion plaintiff filed Exhibits 1 through 61 inclusive with its brief. The Court further understands that counsel stipulated at the hearing October 28, 1981, at Rock Hill, that these two appendices are now in evidence and are a historical record and are the basis for the Court's ruling that the motion in this case is to be decided under Rule 56 rather than under Rule 12(b)(6).

"*3.* Within 20 days after the proposed orders are exchanged between counsel, if desired, supplemental briefs may be filed. Thereafter, oral argument may be directed."

Thereafter on February 26, 1982, defendants' counsel filed a proposed order styled: *Proposed Order Granting*

Summary Judgment. On the same date, counsel for plaintiff filed a proposed order in opposition to defendants proposed order. Plaintiff's proposal is extensive. It has some 52 factual statements and some 60 conclusions of law. It seeks a denial of defendants' motion for summary judgment.

This Court is of the firm view that a decision must be made as to whether the Catawba Termination Act is to be given the effect as contended by defendants or given the limited effect as contended by plaintiff, that is, that only the Memorandum of Understanding entered into in 1943 between the Federal Government, the State of South Carolina, and the Catawba Indian Tribe was terminated by the statute.

Upon due consideration of the two proposed orders presented together with the historical record and the authoritative decisions cited by counsel, as well as the respective arguments, this Court has concluded that there is no genuine issue as to any material fact and that defendants' motion for summary judgment must be granted and this case dismissed.

Congress having acted, it is believed that this Court should give full effect to the statute since from the inception of this Government Congress has regulated the affairs of Indians in all their aspects.

Defendants' proposed order granting summary judgment submitted by counsel for defendants is herewith adopted and made an integral part of this decision. Plaintiff's proposed order for a judgment in opposition thereto is rejected.

Defendants' order follows:

I. *INTRODUCTION TO DEFENDANTS' ORDER*

A. *The Claim*

This action seeks to void the titles presently held by more than 27,000 persons and public and private entities

to land in a 225 square mile area surrounding and including Rock Hill, South Carolina. The plaintiff, Catawba Indian Tribe of South Carolina, Inc., is a corporation operated by persons claiming to be the descendants of Catawba Indians. The plaintiff alleges that the Catawba Indians owned and occupied the land in issue "from time immemorial", and that their ownership was confirmed by agreements and treaties with British and colonial officials in 1760 and 1763. In 1840, the Catawba Indians entered into the Treaty of Nation Ford with the State of South Carolina and thereby transferred any interest they might have had in that land to the State of South Carolina. That treaty and all titles deriving from it are alleged to be void because the transfers effected by that Treaty allegedly violated those provisions of the various Indian Trade and Intercourse Acts regulating the alienation of Indian land, known as the Non-intercourse Act and presently codified as 25 U.S.C. § 177.

B. *The Motion*

The defendants' motion asserts that a 1959 act of Congress (codified at 25 U.S.C. §§ 931-938 and referred to here as the "Catawba Act") bars the prosecution of this action as a matter of law. The defendants' motion has been treated as a motion for summary judgment because, pursuant to the stipulation of the parties, the exhibits to their memoranda have been considered as historical background concerning the Catawba Act.

The only fact necessary to resolve this motion is the undisputed fact that, in 1959, Congress passed the Catawba Act. Because the defendants' motion is addressed solely to the effect of that act upon the legal status of the Catawbas and their claims, the plaintiff's allegations concerning its status prior to 1959 have been assumed, but not found, to be true. Similarly, the plaintiff's allegations concerning events occurring before the 1950's have been assumed, but not found, to be true.

II. *UNDISPUTED FACTS AND ALLEGATIONS ASSUMED TO BE TRUE*

A. *The Parties*

1. The plaintiff is the Catawba Indian Tribe of South Carolina, Inc. ("plaintiff"), a non-profit organization incorporated under the law of South Carolina. [Complaint ¶ 5] The plaintiff's assertions that the persons whom it represents, or their ancestors, were at all relevant times prior to 1959 an Indian tribe, and that plaintiff corporation has succeeded to any rights the alleged tribe may have had, are *assumed* to be true for the purpose of this motion only. The Court judicially notices, however, that the United States appears never to have formally recognized the Catawbas, and notes that the factual question of whether the Catawbas were a tribe is, in any context other than the present motion, disputed.

2. The defendants include the State of South Carolina, other public entities, corporations and individuals. Those defendants are alleged to be representative of a class of at least 27,000 people. [Affidavit of Robert M. Jones, filed October 29, 1980 in support of Plaintiff's Motion for Class Certification]

B. *The Land In Issue*

3. The land sought by the plaintiff but currently held by the defendants and the putative class consists of approximately 144,000 acres or 225 square miles which includes the City of Rock Hill, the Town of Fort Mill and several other smaller communities. Presently located on the land in issue are homes, places of business, schools, churches and government buildings. The land lies in York, Lancaster, and, perhaps, Chester Counties. [Complaint ¶ 1, 4]

C. *Ancient Events Involving The Land In Issue*

4. Neither party has been able to furnish the Court with any document containing the terms of the 1760

Treaty of Pine Tree Hill. However, for the purpose of deciding this motion only, it has been assumed that the Treaty existed and granted the Catawbas some interest in the land in issue.

5. The 1763 Treaty of Fort Augusta was entered into by the Catawbas and British and colonial officials, and provides, in relevant part, only that:

> And we the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendant on their Parts promise and engage that the aforesaid survey shall be compleated and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere.

[Plaintiff's Exhibit 6]

6. Nothing in the 1763 Treaty of Fort Augusta prohibited the Catawbas from alienating the 15 mile square area of land referred to in the Treaty, or prohibited any person from acquiring that land. [*Id.*]

7. The Treaty of Nation Ford was executed in 1840. At the time that Treaty was executed the Catawbas had apparently leased to white settlers all of the land referred to in the 1763 Treaty of Fort Augusta. By the terms of the Treaty Nation Ford the Catawbas agreed to grant their remaining interest in the land in issue to the State of South Carolina in return for the purchase of a tract of land having a value of $5,000, the payment of $2,500 upon their removal from their former lands, and $1,500 each year for nine years. [Plaintiff's Exhibit 12, 15]

8. On December 24, 1842, approximately 630 acres of land were purchased for the Catawbas and held in trust by the State of South Carolina. [Complaint ¶ 5, 19; The 630 acres are sometimes referred to as 638 or 652 acres. *See*, Plaintiff's Exhibit 15]

D. *The 1943 Memorandum of Understanding*

9. In 1943 the State of South Carolina, the Catawbas and the Office of Indian Affairs of the United States Department of Interior entered into a Memorandum of Understanding. Pursuant to that Memorandum of Understanding, South Carolina agreed to authorize the expenditure of up to $75,000 to purchase lands for the Catawbas, and, upon request, to convey to the United States in trust the land then held by South Carolina in trust for the Catawbas as a result of the 1840 Treaty. Pursuant to the Memorandum of Understanding, South Carolina also agreed to appropriate at least $9,500 annually in 1944, 1945 and 1946 to be expended by the Office of Indian Affairs, and to extend the rights and privileges of all citizens, including admission to schools, to the Catawbas. The Office of Indian Affairs further agreed to contribute annually such sums as were available to the welfare of the Catawbas, and to assist the Catawbas in matters involving education, medical treatment, and economic development. [Plaintiff's Exhibit 52]

E. *Events In The Twentieth Century Leading To The Enactment Of The Catawba Act.*

10. On August 1, 1953 House Concurrent Resolution 108 was passed. That Resolution declared that the policy of Congress was to make Indians within the United States subject to the same laws as other persons and to terminate any special status they might have had under federal law. [H.R. Con. Res. 108, H.R. REP. No. 2680, 83d Cong., 2d Sess. (1954), Defendants' Exhibit 3]

11. In September 1954, a special House Study Subcommittee on Indian Affairs reported that, on the basis

of information collected by the Bureau of Indian Affairs, the Catawbas were among the Indian groups able to manage their own affairs and ready for termination. [H.R. Rep. No. 2680, 83d Cong., 2d Sess. (1954) at 2-3, Defendants' Exhibit 6]

12. In 1959 South Carolina Congressman Robert Hemphill introduced H.R. 6128, [105 Cong. Rec. 5466 (1959), Defendants' Exhibit 21] which was to become the Catawba Act. Congressman Hemphill told his congressional colleagues during debates on the legislation:

> It is my purpose to put these people and their land on an even keel, an even station, with other citizens of the United States.

[105 Cong. Rec. 5462 (1959), Defendants' Exhibit 22]

In hearings on the legislation he similarly stated:

> A majority of the Indians want this legislation. They need it to put them on the same status as other citizens with the same responsibilities.

[Transcript of the hearings on H.R. 6128 at 10]

13. Before the bill was introduced, the following steps were taken to insure that the Catawbas desired to be terminated:

> a. Congressman Hemphill requested that a Bureau of Indian Affairs Program Officer be appointed to reside at Rock Hill for a sixty day period to develop a satisfactory plan for the Catawbas. [Defendants' Exhibit 14];
>
> b. The Catawbas adopted a resolution on January 3, 1959 requesting Congressman Hemphill to secure pasage of legislation removing federal restrictions on the alienation of their land, [Resolution of Catawba Tribe of Indians, January 3, 1959, Defendants' Exhibit 17];
>
> c. Congressman Hemphill met with the Catawbas on March 28, 1959 and explained the purpose of the

> legislation to be to dispose of the assets of the tribe and terminate federal responsibility to the tribe and its individual members. At the conclusion of the meeting, and following the explanation, the Catawbas again voted in favor of the bill. [Defendants' Exhibit 19]

14. On September 21, 1959 President Eisenhower signed the bill which became the Catawba Act. [Defendants' Exhibit 27]

15. Pursuant to the terms of 25 U.S.C. § 931, a plebiscite was held among the adult members of the Catawbas. The explanation of section five of the act (25 U.S.C. § 935) furnished to the Catawbas explained that:

> Section 5 revokes the tribal constitution which means that the tribe will no longer exist as a Federally recognized organization. In addition, just as the "tribe" no longer will be a legal entity which will be governed by Federal laws which refer to 'tribes," so the individual members will no longer be subject to laws which apply only to Indians. Nothing in the act prohibits those interested in organizing under State law to carry on any of the nongovernmental activities of the group.

[Defendants' Exhibit 29]

16. On July 1, 1960 the Secretary of the Interior published a notice in the Federal Register that a majority of the adult Catawbas had indicated their agreement to the provisions of the bill and that the provisions of the Catawba Act were effective as of that date. [25 Fed. Reg. 6305, Defendants' Exhibit 32]

17. On July 1, 1962 the Catawbas' constitution was revoked and the termination process was completed. [Defendants' Exhibits 35, 36]

18. The Catawbas have never been relieved of the consequences of the Catawba Act. The Bureau of Indian

Affairs continues to list them among its current list of terminated Indian tribes. [Defendants' Exhibit 39]

19. On October 28, 1980, more than eighteen years and three months after the revocation of the Catawbas' constitution and more than twenty years and three months after the effective date of the Catawba Act, the complaint in this action was filed.

III. *CONCLUSIONS OF LAW*

After considering the undisputed facts (and assumed matters) referred to above and considering the relevant principles of law, this Court concludes that no genuine issue of material fact exists and that defendants are entitled as a matter of law to the entry of a judgment dismissing this action. As a result of the enactment of the Catawba Act four separate grounds independently require entry of judgment in favor of the defendants. The first ground, the failure of the plaintiff to commence this action within the time provided by the applicable statute of limitations, bars any claim the plaintiff may assert without regard to the basis of the claim. The remaining three grounds require dismissal because the enactment of the Catawba Act precludes the plaintiff from proving, as a matter of law, three elements of the prima facie case required to state a claim under the Nonintercourse Act.[1]

A. *The Provisions Of the Catawba Act Make The South Carolina Statute Of Limitations Apply To Any Claim The Catawbas May Have To The Land In Issue, And Any Such Claim Is Barred.*

1. Section five of the Catawba Act, 25 U.S.C. § 935, provides that after the Catawbas' constitution was revoked (which occurred on July 1, 1962):

---

[1] The defendants have suggested that they intend to dispute not only whether the Nonintercourse Act applies in this instance, but also whether the Nonintercourse Act may properly be construed to afford a private right of action. For the purposes of this motion the Court has assumed that such a private right of action exists.

> [T]he laws of the several States shall apply to them [the Catawbas] in the same manner they apply to other persons or citizens within their jurisdiction.

That explicit statutory language directed that state law apply to the Catawbas from the moment their constitution was revoked.

2. The legislative history of the Catawba Act, consisting of the statements of the bill's sponsor and the Department of the Interior, indicates that the Act was intended to provide the Catawbas the same privileges and same responsibilities as other South Carolina citizens. After its passage, the Catawbas were to have the same status as non-Indians. Thus, they and their claims were to be subject to state law in the same manner as other citizens and their claims.

3. Further, even if the provisions of the Catawba Act, as amplified by its legislative history, were less clear, termination of the Catawbas' special federal status accomplished the same result. The Catawba Act is unquestionably a "termination act" which terminated any special federal status the Catawbas may previously have held. The Catawba Act was passed during the period when House Concurrent Resolution 108 firmly established the federal policy to make Indians subject to the same laws as other persons and to terminate any special status the Indians may have had under federal law. The Catawba Act is in a form similar to the language contained in other termination acts, *see, e.g.*, 25 U.S.C. §§ 721-728 (Alabama-Coushatta); 25 U.S.C. §§ 564-564x (Klamath); 25 U.S.C. §§ 971-980 (Ponca). The Catawba Act was viewed, and referred to, as an act which would terminate any special Indian relationship to the federal government both before it was enacted, H.R. REP. No. 910, 86th Cong., 1st Sess. (1959), and S. REP. No. 863, 86th Cong., 1st Sess. (1959), Defendants' Exhibits 25, 26], and after it was enacted. [Excerpts from Hearings on S. 3174 Before the Subcommittee on Indian

Affairs of the Senate Committee on Interior and Insular Affairs, 87th Cong., 2d. Sess. (1962); Bureau of Indian Affairs Branch of Tribal Relations list: Indian Tribes Terminated from Federal Supervision, April 1, 1981, Defendants' Exhibit 10, 39]; *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 133 n.1 (1972). The termination of the special federal status of the Catawbas' made state law apply to them, and to any claim they may have had. *See, e.g., Taylor v. Hearne*, 637 F.2d 689 (9th Cir., *cert. denied*, —— U.S. ——, 102 S.Ct. 291 (1981); *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974); *Bryan v. Itasca County, Minnesota*, 426 U.S. 373 (1976).

4. Because section five of the Catawba Act explicitly made state law applicable to the Catawbas and the termination of the trust relationship accomplished the same result, South Carolina's statute of limitations began to run against any claim the Catawbas or the plaintiff may have had on July 1, 1962, the date the Catawbas' constitution was revoked. *See, e.g., Schrimpscher v. Stockton*, 183 U.S. 290 (1902); *Dillon v. Antler Land Co.*, 341 F. Supp. 734 (D. Mont. 1972), *aff'd*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975); *Dennison v. Topeka Chambers Development Corp.*, 527 F. Supp. 611 (D. Kan. 1981).

5. The relevant South Carolina statute of limitations is § 15-3-340. The statute requires that an action to recover title or possession be brought within ten years. An action to recover title or possession brought more than 18 years after that statute began to run is, accordingly, barred. Although South Carolina appears to prevent a party from obtaining title by adverse possession from "tacking" his period of possession to a predecessor's period of possession (unless the land passed by inheritance) that rule is not relevant to the defendants' assertion that the plaintiff's claims are barred by the statute of limitations. *Haithcock v. Haithcock*, 123 S.C. 61; 115 S.E. 727 (1920).

6. Although the plaintiff asserts claims other than those based on the Nonintercourse Act, the United States imposed no general restraint on the alienation of lands owned by Indians other than the various versions of the Indian Trade and Intercourse Acts, the first of which was enacted on July 22, 1790, and imposed no specific restraint on the alienation of these lands. Even if such other claims existed, section five of the Catawba Act has made the South Carolina statute of limitations apply, and bar, those claims.

7. The plaintiff's arguments against the application of the South Carolina statute of limitations are unavailing:

a. It is inconsistent with the language and legislative history of the Catawba Act, and with official federal policy during the termination era, to read the Act only to revoke the 1943 Memorandum of Understanding. The Catawba Act does not mention the Memorandum of Understanding. Moreover, an act of Congress was not required for the United States either to enter into or to terminate that Memorandum of Understanding.

b. Construing the Catawba Act as making state statutes of limitation apply and begin to run would not "extinguish" any rights. Under this construction, the Act merely changed the procedures by which the Catawbas' could enforce any rights they may have had and ended any trust obligation the federal government may once have had. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972).

c. Finally, *Menominee Tribe v. United States*, 391 U.S. 404 (1968), does not require a different result. First, the *Menominee* Court read other legislation, Public Law 280, to be in *pari materia* with the Menominee termination act because both acts had been passed by the same Congress. Public Law 280 does not apply to the Catawbas, 67 Stat. 588 as amended,

18 U.S.C. § 1162, and, therefore, *Menominee* has no application here. *Sac and Fox Tribe of Mississippi in Iowa v. Licklider*, 576 F.2d 145 (8th Cir.), *cert. denied*, 439 U.S. 955 (1978). Second, no provision of any treaty is claimed to protect any interest the Catawbas may have had, to have prevented the Catawbas from voluntarily alienating any interest they may have had, or to entitle the plaintiff to the recovery of the land in issue. Instead, plaintiff claims that it voluntarily conveyed, in violation of a statute an interest in land which it acquired by a treaty. *Menominee* recognized that statutory rights and privileges were subject to all the effects of termination.

B. *As A Result Of The Catawba Act, The Plaintiff Cannot Prove That It Is An Indian "Tribe".*

8. In order to prevail on its Nonintercourse Act claims, the plaintiff must demonstrate that it presently constitutes an Indian tribe within the meaning of the Nonintercourse Act, *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 581 and 587 n.8 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979), was a tribe when the Nonintercourse Act was violated, *Epps v. Andrus*, 611 F.2d 915, 918 (1st Cir. 1979), and continuously was a tribe in the intervening period. *See, Mashpee Tribe v. New Seabury Corp., supra*; *cf.*, 25 C.F.R. § 54.1 *et seq.*

9. The Catawba Act precludes the plaintiff, as a matter of law, from demonstrating present or continuous tribal existence. To be a tribe a group must have a legal and political existence setting it apart from the general mass. *United States v. Joseph*, 94 U.S. 614, 617 (1877); *United States v. Antelope*, 430 U.S. 641, 646 (1977). Congress may, however, terminate the political existence which is crucial to tribal existence. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

10. Section five of the Catawba Act revoked the tribal constitution and dissolved the former tribal government

of the Catawbas. After the revocation of the tribal constitution the Catawbas were not a governmental entity. Instead, they were permitted to organize on a voluntary basis under state law to carry on nongovernmental activities of the group. Congress' explicit termination of the special federal relationship between the Catawbas and the United States bars the plaintiff, as a matter of law, from proving present or continuous tribal existence.

C. *Congress Ratified The Transfer Of The Land Effected By The 1840 Treaty.*

11. Congress may ratify, and thereby validate, a disputed transfer of Indian land in any manner which recognizes the occurrence or effect of the transfer, including a statute enacted long after the transfer. *See, e.g., Seneca Nation of Indians v. United States*, 173 Ct. Cl. 912 (1965). A subsequent congressional enactment which recognizes that land formerly owned by Indians is no longer owned by them has been construed to validate the original transfer, *Seneca Nation, supra*, as has an enactment which authorized the United States to receive and administer the funds received from the disputed transfer. *Seneca Nation v. Christy*, 126 N.Y. 122 (1891), *writ of error dismissed on other grounds*, 162 U.S. 283 (1896).

12. Congress was unquestionably aware of the 1840 Treaty of Nation Ford and in fact reference is made to it in the House Committee Report. [H.R. REP. No. 910, 86th Cong., 1st Sess. (1959), Defendants' Exhibit 25] Further, section two of the Catawba Act, 25 U.S.C. § 932, explicitly refers to the assets held by the State of South Carolina in trust. Those "assets" included the 630 acres purchased for the Catawbas as a result of the 1840 Treaty. Congress' explicit recognition of those assets and treatment of them in the Catawba Act constitutes explicit recognition and an implicit ratification of the 1840 Treaty.

D. *The Catawba Act Ended Any Trust Relationship Between the United States And The Catawbas.*

13. Finally, to successfully maintain a Nonintercourse Act claim the plaintiff must demonstrate that the alleged trust relationship between it and the United States has never been terminated. *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976); *see Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975). In this case the Congress has, by enacting the Catawba Act, terminated any trust relationship which ever existed between the Catawbas and the United States.

A judgment order follows:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 80-2050

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
also known as the
CATAWBA NATION OF SOUTH CAROLINA,
Plaintiff

v.

STATE OF SOUTH CAROLINA, *et al.*,
Defendants

[Filed June 14, 1982]

JUDGMENT ORDER

AND NOW, *June 10, 1982*, in accordance with the Findings and Conclusions mentioned in the foregoing Memorandum, there being no genuine issue as to any material fact, the motion of defendants for the entry of summary judgment in their favor is granted, and judgment is entered for the defendants and against plaintiff, and this civil action is dismissed of record.

DONE AND ORDERED at Pittsburgh, Pa., for filing at Columbia, South Carolina, effective when filed by the Clerk.

/s/ Joseph P. Willson
JOSEPH P. WILLSON
Senior District Judge

EXHIBIT C

This Court's Prior Decision

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 84-782

SOUTH CAROLINA, *et al.*

v.

CATAWBA INDIAN TRIBE, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Argued December 12, 1985—Decided June 2, 1986

STEVENS, J., delivered the opinion of the Court, in which BURGER, C.J., and BRENNAN, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL and O'CONNOR, JJ., joined, *post*, p. 511.

James D. St. Clair argued the cause for petitioners. With him on the briefs were *James L. Quarles III*, *William F. Lee*, *T. Travis Medlock*, Attorney General of South Carolina, *Kenneth P. Woodington*, Assistant Attorney General, *John C. Christie, Jr.*, *J. William Hayton*, *Stephen J. Landes*, *Lucinda O. McConathy*, *J. D. Todd, Jr.*, *Michael J. Giese*, *Dan M. Byrd, Jr.*, and *Mitchell K. Byrd.*

Don B. Miller argued the cause for respondent. With him on the brief were *Jean H. Toal* and *Robert M. Jones.**

JUSTICE STEVENS delivered the opinion of the Court.

At issue in this litigation is the right to possession of a "Tract of Land of Fifteen Miles Square" described in a 1763 treaty between the King of England and the Catawba Head Men and Warriors.[1] The tract, comprising 144,000 acres and 225 square miles, is located near the northern border of South Carolina; some 27,000 persons now claim title to different parcels within the tract. The specific question presented to us is whether the State's statute of limitations applies to the Tribe's claim. The answer depends on an interpretation of a statute enacted by Congress in 1959 to authorize a division of Catawba tribal assets. See 25 U.S.C. §§ 931-938. We hold that the State's statute applies, but we do not reach the question whether it bars the Tribe's claim.

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* *Solicitor General Lee, Assistant Attorney General Habicht, Edwin S. Kneedler, Jacques B. Gelin,* and *Arthur E. Gowran* filed a brief for the United States as *amicus curiae.*

[1] The 1763 Treaty of Fort Augusta was entered into by the Catawbas and British and colonial officials, and provides, in relevant part:

"And We the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendant on their Parts promise and engage that the aforesaid survey shall be compleated and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere." XI Colonial Records of North Carolina 201-202 (1763), reprinted in App. 35.

Simply stated, the Tribe [2] claims that it had undisputed ownership and possession of the land before the first Nonintercourse Act was passed by Congress in 1790; [3] that the Nonintercourse Act prohibited any conveyance of tribal land without the consent of the United States; and that the United States never gave its consent to a conveyance of this land. Accordingly, the Tribe's purported conveyance to South Carolina in 1840 is null and void. Among the defenses asserted by petitioners [4] is the contention that, even if the Tribe's claim was valid before passage and enactment of the Catawba Division of Assets Act, § 5 of the Act made the state statute of limitations applicable to the claim. Because that is the only contention that we review, it is not necessary to describe much of the historical material in the record.

I

In 1760 and 1763, The Tribe surrendered to Great Britain its aboriginal territory in what is now North and South Carolina in return for the right to settle permanently on the "Tract of Land of Fifteen Miles

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[2] The respondent, Catawba Indian Tribe, Inc., is a nonprofit corporation organized under the laws of South Carolina in 1975. Like the District Court and the Court of Appeals, we assume that the respondent is the successor in interest of the Catawba Indian Tribe of South Carolina. For convenience, we refer to the respondent as the "Tribe" throughout this opinion.

[3] See Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138. The Act, now codified at 25 U. S. C. § 177, states in relevant part:

"No purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

[4] The petitioners include the State of South Carolina and approximately 76 other parties who are named as defendants in the complaint; they were sued as representatives of a class that was alleged to consist of the approximately 27,000 persons who claim an interest in the disputed land.

square" that is now at issue. For purposes of this summary judgment motion, it is not disputed that the Tribe retained title to the land when the Nonintercourse Acts were passed.

By 1840, the Tribe had leased most, if not all, of the land described in the 1763 treaty to white settlers. In 1840, the Tribe conveyed its interest in the "Tract of Land of Fifteen Miles square" to the State of South Carolina by entering into the "Treaty of Nation Ford." In that treaty, the State agreed, in return for the "Tract," to spend $5,000 to acquire a new reservation, to pay the Tribe $2,500 in advance, and to make nine annual payments of $1,500 in the ensuing years. In 1842, the State purchased a 630-acre tract as a new reservation for the Tribe, which then apparently had a membership of about 450 persons.[5] This land is still held in trust for the Tribe by South Carolina.

The Tribe contends that the State did not perform its obligations under the treaty—it delayed the purchase of the new reservation for over 2½ years; it then spent only $2,000 instead of $5,000 to purchase the new land; and it was not actually "new" land because it was located within the original 144,000-acre tract. Still more importantly, as noted, the Tribe maintains that this entire transaction was void because the United States did not consent to the conveyance as required by the Nonintercourse Act.

At various times during the period between 1900 and 1943, leaders of the Tribe applied to the State for citizenship and for a "final settlement of all their claims against the State."[6] Petitioners argue that these claims merely sought full performance of the State's obligations under the 1840 treaty, but, for purposes of our decision, we accept the Tribe's position that it was then

[5] An 1825 War Department chart indicated that the Catawbas totaled 450 persons. 2 American State Papers 545 (1925).

[6] See 1920 S. C. Acts 1700, Joint Res. No. 904, § 1.

asserting a claim under the Nonintercourse Acts and thus challenging the treaty itself. In any event, both state officials and representatives of the Federal Government took an interest in the plight of the Tribe.[7]

In response to this concern, on December 14, 1943, the Tribe, the State, and the Office of Indian Affairs of the Department of the Interior entered into a Memorandum of Understanding which was intended to provide relief for the Tribe, but which did not require the Tribe to release its claims against the State.[8] Pursuant to that agreement, the State purchased 3,434 acres of land at a cost of $70,000 and conveyed it to the United States to be held in trust for the Tribe.[9] The Federal Government agreed to make annual contributions of available sums for the welfare of the Tribe and to assist

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[7] In 1930, a Subcommittee of the Senate Committee on Indian Affairs held hearings in Rock Hill, South Carolina, which is located in the 144,000-acre tract. Senator Thomas of Oklahoma wrote that the "subcommittee . . . found some hundred and seventy-five remnants of this band located on a tract of practically barren rock and gradually starving to death." Division of Tribal Assets of Catawba Indian Tribe, Hearings on H. R. 6128, before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 86th Cong., 1st Sess. (unpublished), Insert 5, at 3 (Minutes of State and Federal Conference, Oct. 21, 1858) (6 Record Ex. 56), quoting Feb. 10, 1932, letter, Senator Thomas to Commissioner Rhoads.

[8] Preliminary drafts of the Memorandum of Understanding contained a provision extinguishing the Tribe's reservation claim (6 Record Ex. 49), but that provision was deleted. The Solicitor of the Department of the Interior emphasized that the agreement should not use "a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts." United States Department of the Interior, Office of the Solicitor, Memorandum for the Commissioner of Indian Affairs. *Id.*, Ex. 50, p. 3.

[9] The State also agreed to appropriate at least $9,500 annually for three years for the benefit of the Tribe and to extend to Catawbas the rights and privileges of all citizens, including admission to public schools. *Ibid.*

the Tribe with education, medical benefits, and economic development. For its part, the Tribe agreed to conduct its affairs on the basis of the Federal Government's recommendations; it thereafter adopted a Constitution approved by the Secretary of the Interior pursuant to the Indian Reorganization Act, 25 U. S. C. § 476.

In 1953, Congress decided to make a basic change in its policies concerning Indian affairs. The passage of House Concurrent Resolution 108 on August 1, 1953,[10] marked the beginning of the "termination era"—a period that continued into the mid-1960s, in which the Federal Government endeavored to terminate its supervisory responsibilities for Indian tribes.[11] Pursuant to that policy, the Federal Government identified the Catawba Tribe as a likely candidate for the withdrawal of federal services.[12] Moreover, members of the Tribe desired an

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[10] That Resolution declared: "[I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship." H. R. Con. Res. 108, 83d Cong., 1st Sess. (1953), 67 Stat. B132.

[11] According to one compilation, between 1954 and 1962, Congress passed 12 separate "Termination Acts," the 11th of which was the Catawba Act. See F. Prucha, The Great Father 1048 (1984). The termination policy has been criticized by various commentators. See, *e.g.*, Cornell, The New Indian Politics, 10 Wilson Q. 113, 121 (1986); F. Prucha, *supra*, at 1046-1059; Wilkinson & Biggs, The Evolution of the Termination Policy, 5 American Indian L. Rev. 139 (1977); Preloznik & Felsenthal, The Menominee Struggle to Maintain Their Tribal Assets and Protect Their Treaty Rights Following Termination, 51 N. D. L. Rev. 53 (1975). The ultimate legislative wisdom of the termination policy is, of course, not before the Court.

[12] In September 1954, a House Study Subcommittee on Indian Affairs reported that the Catawba Tribe was one of the groups able to take responsibility for their affairs and therefore was ready

end to federal restrictions on alienation of their lands in order to facilitate financing for homes and farm operations.[13] Accordingly, after discussions with representatives of the Bureau of Indian Affairs in which representatives of the Bureau of Indian Affairs in which leaders of the Tribe were assured that any claim they had against the State would not be jeopardized by legislation terminating federal services, the Tribe adopted a resolution supporting such legislation and authorizing a distribution of tribal assets to the members of the Tribe.[14] After receiving advice that the Tribe supported legislation authorizing the disposal of the tribal assets and terminating federal responsibility for the Tribe and its individual members, Congress enacted the Catawba Indian Tribe Division of Assets Act, 73 Stat. 592, 25 U.S.C. §§ 931-938. The Act provides for the preparation of a tribal membership roll, § 931; the tribal council's designation of sites for church, park, playground, and cemetery purposes, § 933(b); and the division of re-

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for termination of federal services. H. R. Rep. No. 2680, 83d Cong., 2d Sess., 2-3 (1954). In contrast to the report made by Senator Thomas in 1930, n. 7, *supra*, the Reports accompanying the Act concluded that the Catawbas had been able to merge into the general community and had been able to attain an economic position comparable to that of non-Indians. See S. Rep. No. 863, 86th Cong., 1st Sess., 3 (1959) ("The Catawba Indians have advanced economically . . . during the past 14 years, and have now reached a position that is comparable to their non-Indian neighbors"); H. R. Rep. No. 910, 86th Cong., 1st Sess., 2 (1959) (same). Most adult male Catawbas were employed at the time: 47% were in industry, 20% in skilled labor, 7% in the Armed Services, 15% in odd jobs, 5% retired, and 6% on the welfare rolls. S. Rep., at 4; H. R. Rep., at 5.

[13] See 105 Cong. Rec. 5462 (1959) (statement of Rep. Hemphill); App. 102.

[14] The resolution adopted at the meeting of the Tribe on January 3, 1959, expressly noted that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." *Id.*, at 103.

maining assets among the enrolled members of the Tribe, § 933(f). The Act also provides for the revocation of the Tribe's Constitution and the termination of federal services for the Tribe, § 935. It explicitly states that state laws shall apply to members of the Tribe in the same manner that they apply to non-Indians. *Ibid.* Pursuant to that Act, the 3,434-acre reservation that had been acquired as a result of the 1943 Memorandum of Understanding was distributed to the members of the Tribe; the Secretary of the Interior revoked the Tribe's Constitution, effective July 1, 1962.

In 1980, the Tribe commenced this action seeking possession of the 225-square-mile tract and trespass damages for the period of its dispossession. All of the District Judges for the District of South Carolina recused themselves, and Judge Willson of the Western District of Pennsylvania was designated to try the case. After the development of a substantial record of uncontested facts, Judge Willson granted the petitioners' motion for summary judgment. His order of dismissal was initially reversed by a panel of the Court of Appeals for the Fourth Circuit, 718 F. 2d 1291 (1983); sitting en banc, the full Court of Appeals adopted the panel's opinion. 740 F. 2d 305 (1984). Because of the importance of the case, we requested the views of the Solicitor General of the United States and granted certiorari, 471 U.S. 1134 (1985). We now reverse.

II

Section 5 of the Catawba Act is central to this dispute. As currently codified, it provides:

> "The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians,

> all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States." 25 U.S.C. § 935.

This provision establishes two principles in unmistakably clear language. First, the special federal services and statutory protections for Indians are no longer applicable to the Catawba Tribe and its members. Second, state laws apply to the Catawba Tribe and its members in precisely the same fashion that they apply to others.

The Court of Appeals disagreed with this reading of the Act. For it concluded that the word "them" in the second sentence of § 5 could refer to the individual Indians who are members of the Tribe and not encompass the Tribe itself. Relying on the canon that doubtful expressions of legislative intent must be resolved in favor of the Indians,[15] it thus held that the language in § 5 about the inapplicability of federal Indian statutes and the applicability of state laws did not reach the Tribe itself.

The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.[16] It seems clear to us that the antecedent of

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[15] *DeCoteau* v. *District County Court*, 420 U. S. 425, 444 (1975); *Antoine* v. *Washington*, 420 U. S. 194, 199-200 (1975); *Mattz* v. *Arnett*, 412 U. S. 481, 504-505 (1973).

[16] See *Oregon Dept. of Fish and Wildlife* v. *Klamath Indian Tribe*, 473 U. S. 753, 774 (1985) ("[E]ven though 'legal ambiguities are resolved to the benefit of the Indians,' *DeCoteau* v. *District County Court*, 420 U. S. 425, 447 (1975), courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal, *Washington* v. *Washintgon Commercial Passenger Fishing*

the words "them" and "their" in the second sentence of § 5 is the compound subject of the first clause in the sentence, namely, "the tribe and its members." To read the provision otherwise is to give it a contorted construction that abruptly divorces the first clause from the second and the third, and that conflicts with the central purpose and philosophy of the Termination Act. According the statutory language its ordinary meaning, moreover, is reinforced by the fact that the fiirst sentence in the sections provides for a revocation of the Tribe's Constitution. It would be most incongruous to preserve special protections for a tribe whose constitution has been revoked while withdrawing protection for individual members of that tribe.[17]

Without special federal protection for the Tribe, the state statute of limitations should apply to its claim in this case. For it is well established that federal claims are subject to state statutes of limitations unless there is a federal statute of limitations or a conflict

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Vessel Assn., 443 U. S. [658, 673 (1979)], clearly runs counter to a tribe's later claims"); *Rice* v. *Rehner*, 463 U. S. 713, 732 (1983) (canon of construction regarding certain Indian claims should not be applied "when application would be tantamount to a formalistic disregard of congressional intent"); *Andrus* v. *Glover Construction Co.*, 446 U. S. 608, 618-619 (1980); *DeCoteau* v. *District County Court*, 420 U. S., at 447 ("A canon construction is not a license to disregard clear expressions of tribal and congressional intent").

[17] Respondent argues that the scope of the Act was merely to terminate the specific federal services arising from the 1943 Memorandum of Understanding. Such a limited interpretation cannot be reconciled with the broader language of the Act ("The tribe and its members shall not be entitled to *any* of the special services performed by the United States for Indians because of their status as Indians"; "*all* statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them"; "the laws of the several states shall apply to them *in the same manner* they apply to other persons or citizens within their jurisdiction") (emphasis added).

with federal policy.[18] Although federal policy may preclude the ordinary applicability of a state statute of limitations for this type of action in the absence of a specific congressional enactment to the contrary, *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985), the Catawba Act clearly suffices to reestablish the usual principle regarding the applicability of the state statute of limitations. In striking contrast to the situation in *County of Oneida*, the Catawba Act represents an explicit redefinition of the relationship between the Federal Government and the Catawbas; an intentional termination of the special federal protection for the Tribe and its members; and a plain statement that state law applies to the Catawbas as to all "other persons or citizens."

That the state statute of limitations applies as a consequence of terminating special federal protections is also supported by the significance we have accorded congressional action redefining the federal relationship with particular Indians. We have long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims.[19]

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[18] See, *e. g.*, *Wilson* v. *Garcia*, 471 U. S. 261, 266-267 (1985); *Board of Regents* v. *Tomanio*, 446 U. S. 478, 483-484 (1980); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 462 (1975); *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 703-704 (1966); *Cope* v. *Anderson*, 331 U. S. 461, 463 (1947); *Rawlings* v. *Ray*, 312 U. S. 96, 97 (1941); *O'Sullivan* v. *Felix*, 233 U. S. 318, 322-323 (1914); *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 397-398 (1906); *McClaine* v. *Rankin*, 197 U. S. 154, 158 (1905); *Campbell* v. *Haverhill*, 155 U. S. 610, 617 (1895); *M'Clung* v. *Silliman*, 3 Pet. U. S. 270, 277 (1830).

[19] See, *e. g.*, *Larkin* v. *Paugh*, 276 U. S. 431, 439 (1928) ("With the issue of the patent, the title not only passed from the United States but the prior trust and the incidental restrictions against alienation were terminated. This put an end to the authority theretofore possessed by the Secretary of the Interior by reason of the trust and restriction—so that thereafter all questions pertaining to the title were subject to examination and determination by the courts, appropriately those in Nebraska, the land being there");

Similarly, we have emphasized that Termination Acts subject members of the terminated tribe to "the full sweep of state laws and state taxation." [20] These principles reflect an understanding that congressional action to remove restraints on alienation and other federal protections represents a fundamental change in federal policy with respect to the Indians who are the subject of the particular legislation.

Dickson v. *Luck Land Co.*, 242 U. S. 371, 375 (1917) ("With those restrictions [of Congress] entirely removed and the fee simple issued it would seem that the situation was one in which all questions pertaining to the disposal of the lands naturally would fall within the scope and operation of the laws of the State"); *United States* v. *Waller*, 243 U. S. 452, 461-462 (1917) ("We cannot escape the conviction that the plain language of this act evidences the intent and purpose of Congress to make such lands allotted to mixed-blood Indians subject to alienation with all the incidents and rights which inhere in full ownership in persons of full capacity"); *Schrimpscher* v. *Stockton*, 183 U. S. 290, 296 (1902) (after a treaty removed restraints from alienation of land by certain Wyandotte Indians, state statute of limitations ran against Indians, even though Indians later asserted claim of a prior federal treaty violation; after removal of restraints on alienation, the Indian's heirs "were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands").

[20] *Bryan* v. *Itasca County*, 426 U. S. 373, 389 (1976). See also *United States* v. *Antelope*, 430 U. S. 641, 647, n. 7 (1977) ("[M]embers of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act"); *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972) (terminated members of Tribe must bring action to invalidate allegedly fraudulent conveyance under same laws as other citizens).

As the Court of Appeals noted, in *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968), the Court concluded that the Menominee Termination Act did not terminate the Tribe's hunting and fishing rights. The Court emphasized that the Termination Act must be read *in pari materia* with an Act passed in the same Congress that preserved hunting and fishing rights. *Id.*, at 411. In this case, of course, there is no similar contemporaneous status. Moreover, in *Menominee*, the Court was concerned about a "backhanded" abrogation of treaty rights, *id.*, at 412; no comparable abrogation is at issue here.

The Court of Appeals found support for its conclusion about the nonapplicability of the state statute of limitations in § 6 of the Catawba Act, which provides that nothing in the statute affects the rights of the Tribe under the laws of South Carolina.[21] The thrust of the Court of Appeals' reasoning was that, if a state law was inapplicable to the Tribe or its members before the effective date of the Act, its application after the effective date necessarily violates § 6. But such a reading contradicts the plain meaning of § 5's reference to the applicability of state laws. In our view § 6 was merely intended to remove federal obstacles to the ordinary application of state law. Section 6 cannot be read to preserve, of its own force, a federal tribal immunity from otherwise applicable state law without defeating a basic purpose of the Act and negating explicit language in § 5.[22] Most fundamentally, § 6 simply does not speak to the explicit redefinition of the federal relationship with the Catawbas that is the basis for the applicability of the state statute of limitations.

Finally, the Court of Appeals relied heavily on the assurance to the Tribe that the status of any claim against South Carolina would not be affected by the legislation.[23] Even assuming that the legislative provi-

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[21] As currently codified, § 6 provides:

"Nothing in this subchapter shall affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina." 25 U. S. C. § 936.

[22] It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti* v. *Franklin*, 439 U. S. 379, 392 (1979). See also *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U. S. 237, 249 (1985); *United States* v. *Menasche*, 348 U. S. 528, 538-539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' *Montclair* v. *Ramsdell*, 107 U. S. 147, 152, rather than to emasculate an entire section").

[23] See 718 F. 2d 1291, 1296 (1983) (quoting Bureau of Indian Affairs official's assurance that " 'any claim the Catawbas had against the State would not be jeopardized by carrying out a program with the Federal Government' ").

sions are sufficiently ambiguous to warrant reliance on the legislative history, we believe that the Court of Appeals misconceived the import of this assurance. We do not accept petitioners' argument that the Catawba Act immediately extinguished any claim that the Tribe had before the statute became effective. Rather, we assume that the status of the claim remained exactly the same immediately before and immediately after the effective date of the Act, but that the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction. As a result, unlike the Court of Appeals, we perceive no contradiction between the applicability of the state statue of limitations and the assurance that the status of any state claims would not be affected by the Act.

We thus conclude that the explicit redefinition of the federal relationship reflected in the clear language of the Catawba Act requires the application of the state statute of limitations to the Tribe's claim.

III

The District Court held that respondent's claim is barred by the South Carolina statute of limitations. The Court of Appeals' construction of the 1959 federal statute made it unnecessary for that court to review the District Court's interpretation of state law. Because the Court of Appeals is in a better position to evaluate such an issue of state law than we are,[24] we remand the case to that court for consideration of this issue.

It is so ordered.

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[24] See *Pembaur* v. *Cincinnati*, 475 U. S. 469, 484-485, n. 13 (1986); *Regents of University of Michigan* v. *Ewing*, 474 U. S. 214, 224, n. 10 (1985); *Bishop* v. *Wood*, 426 U. S. 341, 345-347 (1976); *Propper* v. *Clark*, 337 U. S. 472, 486-487 (1949).

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE O'CONNOR join, dissenting.

The Catawba Indian Tribe Division of Assets Act, 73 Stat. 592, 25 U. S. C. § 931 *et seq.*, was passed by Congress in 1959 to divide up the Tribe's federally supervised reservation so that individual Catawbas could sell or mortgage their allotments. The Court today concludes that the Act also had the incidental effect of applying a South Carolina statute of limitations to the Catawbas' pre-existing and longstanding claim to lands the State purported to purchase from the Tribe in 1840. I feel this interpretation cannot be reconciled with the language of the Act under this Court's traditional approach to statutes regulating Indian affairs. I therefore dissent.

I

Too often we neglect the past. Even more than other domains of law, "the intricacies and peculiarities of Indian law deman[d] an appreciation of history." Frankfurter, Foreword to A Jurisprudential Symposium in Memory of Felix S. Cohen, 9 Rutgers L. Rev. 355, 356 (1954).

Before the arrival of white settlers, the Catawba Indians occupied much of what is now North and South Carolina. In the 1760 Treaty of Pine Tree Hill, the Catawbas relinquished the bulk of their aboriginal territory to Great Britain in exchange for assurances that they would be allowed to live in peace on a small portion of that territory, a square of land 15 miles on each side (144,000 acres), which today surrounds and includes Rock Hill, S. C. Three years later, in the Treaty of Augusta, the Tribe again agreed to "remain satisfied with the Tract of Land of Fifteen Miles square," and the British once more promised that "the Catawba shall not in any respect be molested by any of the King's subjects within the said Lines." App. 35. It is the 144,000 acres reserved for the Catawbas in 1760 and again in

1763—"a mere token of the[ir] once large domain"—that give rise to this litigation. See J. Brown, The Catawba Indians 8 (1966) (Brown).

The historical record suggests that the Catawbas were driven to the agreements of 1760 and 1763 in large part by the colonists' repeated and continuing encroachments on tribal lands.[1] Some of the land was acquired by purchase, see, *e.g.*, *id.*, at 165, but in South Carolina, as elsewhere, "[f]rom the very beginning abuses marred the transfer of land titles from the Indians to individuals among the English colonists." F. Prucha, American Indian Policy in the Formative Years 6 (1962). Indeed, the South Carolina Provincial Council took legislative notice in a 1739 statute that lands purchased from Indians were "generally obtained . . . by unfair representations, fraud and circumvention, or by making them gifts or presents of little value, by which practices, great resentments and animosities have been created amongst the Indians toward the inhabitants of this Province." An Act to restrain and prevent the purchasing Lands from Indians, 1 The First Laws of the State of South Carolina 160-161 (J. Cushing ed. 1981). The 1739 statute therefore barred the private acquisition of Indian lands without a grant or license from the Crown or the Governor, but such steps apparently did little to stop white encroachments on Indian territory. See Clinton

[1] In letters written in 1754 to the Catawbas and to the President of the Council of North Carolina, Governor Glen of South Carolina noted that the Catawbas repeatedly had complained about whites' settling too close to them. 6 Record, Exs. 1 and 2. In response to these complaints, Governor Glen forbade whites to settle within 30 miles of Catawba towns, *ibid.*, but that prohibition was frequently ignored. See C. Hudson, The Catawba Nation 49 (1970). For general discussions of early colonial encroachments on Catawba land, see Brown, at 163-166; P. Dammann, D. Miller, & D. Israel, A History of the Catawba Tribe and its Reservation Lands, reprinted in Settlement of the Catawba Indian Land Claims, Hearing before the House Committee on Interior and Insular Affairs on H. R. 3274, 96th Cong., 1st Sess., 135, 151-153 (1979) (Hearing).

& Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 U. Maine L. Rev. 17, 21 (1979). Recognizing that "great frauds and abuses have been committed in the purchasing lands of the Indians," the Crown in October 1763—shortly before the signing of the Treaty of Augusta—flatly forbade any further private purchases of land reserved for Indian tribes. Proclamation of 1763, reprinted in 3 W. Washburn, The American Indian and the United States 2135, 2138 (1973).

The United States from an early date followed a similar policy. Since 1790, the Nonintercourse Act, now codified as reenacted and amended at 25 U. S. C. § 177, has broadly prohibited the sale of Indian land without the consent of the Federal Government. Despite this prohibition—which in 1793 was extended to include not only outright purchases but also acquisitions of any "claim" to protected lands, see Act of Mar. 1, 1793, § 8, 1 Stat. 330—mounting pressures from settlers in the early 19th century led the State of South Carolina to enact a series of statutes purporting to authorize the leasing of Catawba lands to non-Indians. Initially, the leases signed under these statutes seem to have posed little threat to the Tribe. According to B. S. Massey, who knew the Catawbas during this time and later served as South Carolina's agent to the Tribe, "[t]hey were then strong and felt themselves in their own greatness, governed by their own laws, working the best spots of their lands and leasing out the poorer portions to the white men." Report to The Governor of South Carolina on the Catawba Indians 4 (1854), reprinted in 6 Record, Ex. 11.

By the 1830's, however, nearly all of the 144,000 acres reserved for the Tribe in the Treaty of Augusta had been leased to non-Indians. This situation proved disastrous, because rents were "generally paid in old horses,

old cows or bed quilts and clothes, at prices that the whites set on the articles taken." *Ibid.* The Catawbas soon were reduced to "a state of starvation and distress," *ibid.*, and they ultimately gave in to repeated efforts by the State to purchase their land. In 1840, representatives of the Tribe and the State signed the Treaty of Nation Ford. Under this "treaty"—which the United States never joined or approved—the Catawbas relinquished all their land in exchange for two promises. First, the State promised the sum of $16,000 in a series of resettlement payments. Second, the State pledged that it would purchase a new reservation "of the value of five thousand dollars," including 300 acres of "good arable lands fit for cultivation" in a thinly populated area of North or South Carolina satisfactory to the Indians. App. 38-39.[2]

The South Carolina Legislature promptly provided for the transfer of title from the State to the lessees of the 144,000 acres, requiring only that the lessees reimburse the State proportionately for its advances to the Tribe. Act of Dec. 18, 1840, § 3, 7 S. C. Stats. 103 (1840). Unfortunately, the State showed less enthusiasm in fulfilling its contractual obligations to the Indians. After allowing the Catawbas to wander homeless and uncompensated for 2½ years, the State reportedly spent $2,000

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[2] According to Massey, the Indians "were driven to" this agreement "by being surrounded by white men, [who] cheat[ed] them out of their rights, and [by] partaking of the vices of the whites and but few of their virtues." Report to The Governor of South Carolina on the Catawba Indians 5 (1854), reprinted in 6 Record, Ex. 11. The "vices" to which Massey referred may have included the consumption of alcohol; the Catawbas later charged that state representatives negotiated the treaty by setting out a whiskey barrel and tin cups and inviting the Indians to help themselves. This charge was reported to the Department of the Interior in a 1908 memorandum by Catawba tribal attorney Chester Howe. See Plaintiffs' Response to Defendants' Motion to Dismiss in No. 80-2050-6(CA4) p. 23, n. 30, citing Record Group 75, National Archives Central Files 1907-1939, BIA File No. 1753-1906.

to buy back 630 agriculturally undesirable acres of the Catawbas' original 18th-century treaty lands as a "new" reservation for the Tribe.[3] The State continues to hold these 630 acres for the Catawbas. It is unclear from the record before us whether the Tribe ever received the resettlement payments promised by the State.

In the 146 years that have passed since the Nation Ford agreement, the Catawbas repeatedly have pressed their claim to the 144,000 acres, which they feel were taken from them illegally. In the early 1900's, the Tribe petitioned both the Federal Government and the State of South Carolina for relief, arguing that the 1840 transfer was void because the United States had not approved it. The Commissioner of Indian Affairs advised the Catawbas in 1906 and again in 1909 that the Department of the Interior would not seek relief on their behalf. He explained that the Catawbas were "state Indians" for whom the United States had no responsibility, and, consequently, that the absence of federal participation in the Treaty of Nation Ford did not void the transaction.[4] In 1908, the South Carolina Attorney General reached the same conclusion, and advised the state legislature that the Tribe had no outstanding claim

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[3] See Brown, at 317, 320-322. Assuming this account is correct, the new reservation was less than one-half of one percent of the Tribe's 1763 treaty lands. The price paid by the State for the new reservation—which works out to roughly $3.17 per acre—contrasts strikingly with the price paid for the same land when purchased from the Indians 2½ years earlier—the approximate equivalent of 15 cents per acre payable in installments over 10 years.

[4] 6 Record, Exs. 18, 20. But see *United States* v. *Candelaria*, 271 U. S. 432, 442 (1926) (construing the term "Indian Tribe" in the Nonintercourse Act to refer to any " 'body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory,' " quoting *Montoya* v. *United States*, 180 U. S. 261, 266 (1901); *Joint Council of Passamaquoddy Tribe* v. *Morton*, 528 F. 2d 370, 376-378 (CA1 1975) (applying Nonintercourse Act to Tribe lacking federal recognition).

to any of the 144,000 acres. 1908 Op. S. C. Atty. Gen. 17, 18, 29-32. The Tribe nonetheless continued to press its claim to the land. A federal Indian agent visiting the Catawbas in December 1910, for example, was asked about the Tribe's prospects for recovering "their old reservation of 15 miles square"; he told them the Department of the Interior would not take their case into court. 6 Record, Ex. 21, pp. 11-12 (letter from C. Davis to Comm'r of Indian Affairs, Jan. 5, 1911).

The seeds of the legislation found dispositive by the Court today were planted in 1943, when the Tribe, the State of South Carolina, and the Department of the Interior concluded a Memorandum of Understanding providing for a new reservation for the Catawbas, and placing the Tribe and the new reservation under federal supervision. Evidently concerned about the Tribe's continued grievances concerning the 1840 agreement, South Carolina sought, unsuccessfully, to include in the Memorandum a waiver of any outstanding claims the Catawbas had against the State. *Id.*, Ex. 48 (letter from Ass't Comm'r of Indian Affairs to S. C. State Auditor, Aug. 28, 1941). Preliminary drafts of the Memorandum included such a waiver, see *id.*, Ex. 49, p. 5, but federal officials ultimately dropped the provision because they doubted the legality of using the agreement to deprive the Indians of claims that otherwise might be enforceable in court, see App. 43-44 (memorandum from Interior Dept. Solicitor to Comm'r of Indian Affairs, Jan. 13, 1942).

In 1958, after representatives from the Bureau of Indian Affairs suggested to the Catawbas that their financial difficulties could be alleviated by distributing the Tribe's federally supervised assets and ending federal restrictions on alienation, the Indians expressed concern about their claims against the State, but they were assured that the proposal would not jeopardize those claims. 6 Record, Ex. 53, pp. 7-8 (memorandum from

program officer to Tribal Programs Branch Chief, Jan. 30, 1959) (quoted by the Court, *ante*, at 510, n. 23). The Tribe then adopted a resolution calling on its Congressman, Robert Hemphill, to introduce and secure passage of legislation to remove restraints on alienation and to distribute tribal assets; the resolution specifically requested, however, that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." App. 103.

Representative Hemphill asked the Bureau of Indian Affairs to draft legislation "to accomplish the desires set forth in the Resolution." *Id.*, at 50. He then presented the draft bill to the Catawbas and told them that it had been "drawn up to carry out the intent of the resolution." *Id.*, at 111. After a majority of the Tribe expressed approval, Representative Hemphill introduced the bill in Congress, explaining that the Tribe had given its consent. See 105 Cong. Rec. 5462 (1959). The result was the 1959 Division of Assets Act, which the Court today concludes may bar the Tribe from pursuing its claim to the lands reserved for it in 1760 and 1763.

In the 1970's, spurred by favorable legal rulings elsewhere in the country, Catawba leaders renewed their request to the Department of the Interior to seek relief for the Tribe. In 1977, the Solicitor of the Department concluded that the rebuffs given the Catawbas in 1906 and 1909 had been legally unjustified, and that the Tribe could establish a prima facie claim to the 144,000 acres. He further concluded that the Division of Assets Act operated prospectively only, and did not affect pre-existing rights. Accordingly, the Solicitor formally requested the Department of Justice to institute legal action on behalf of the Catawbas and to support the settlement discussions that the Tribe already had initiated with South Carolina officials. See App. to Brief in Opposition 3a. The litigation request was later withdrawn in an effort to emphasize that the Interior Department favored a ne-

gotiated settlement if at all possible, and settlement legislation backed by the Tribe was introduced in Congress. See Hearing, at 15-17 (statement of Leo M. Krulitz, Solicitor of the Department of the Interior). The legislative efforts apparently proved fruitless, and in October 1980 the Tribe filed this suit.

II

The Tribe's complaint asserts a right to possession of the reserved portion of its aboriginal territory under the Nonintercourse Act, the Federal Constitution, and the treaties of 1760 and 1763.[5] These are federal claims, see *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 666-678 (1974) (*Oneida I*), and the statute of limitations is thus a matter of federal law, see *County of Oneida* v. *Oneida Indian Nation*, 470 U. S. 226, 240-244 (1985) (*Oneida II*). Where, as here, Congress has not specified a statute of limitations, federal courts generally borrow the most closely analogous limitations period under state law, but *only* if application of the state limitations period would not frustrate federal policy. See, *e. g.*, *Wilson* v. *Garcia*, 471 U. S. 261, 266-267 (1985); *DelCostello* v. *Teamsters*, 462 U. S. 151, 158-163 (1983); *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, 367 (1977).

In *Oneida II*, the Court recognized that application of state statutes of limitations to Indian land claims generally *would* violate federal policy. The Court noted that a 1950 federal statute giving New York courts jurisdic-

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[5] Although the complaint asks in part that the Tribe "be restored to immediate possession" of virtually the entire 144,000 acres, App. 25, the available remedies, even if the Tribe prevailed, well might be limited by equitable considerations. See *Yankton Sioux Tribe* v. *United States*, 272 U. S. 351, 357 (1926). The question currently before the Court, of course, is not whether part or all of the land claimed by the Catawbas should be given back to them, but whether the Tribe's ability to seek any judicial relief at all is governed by South Carolina's statute of limitations.

tion over most civil disputes involving Indians had been carefully crafted to exempt pre-existing land claims from the operation of a New York statute of limitations. See Act of Sept. 13, 1950, 64 Stat. 845, 25 U. S. C. § 233. Furthermore, in a later series of more general enactments imposing a federal statute of limitations on certain tort and contract actions brought anywhere in the United States by Indians or by the United States on behalf of Indians, Congress specifically excluded from the limitations period all actions "to establish the title to, or right of possession of, real or personal property." 28 U. S. C. § 2415(c).[6] The Court in *Oneida II* con-

[6] The federal statute of limitations for certain tort and contract actions brought by the United States on behalf of Indian Tribes was first adopted in 1966; the limitations period was not applied to suits brought by Indians themselves until 1982. "In 1972 and again in 1977, 1980, and 1982, as the statute of limitations was about to expire for pre-1966 claims, Congress extended the time within which the United States could bring suits on behalf of the Indians." *Oneida II*, 470 U. S., at 242. The debates over these amendments to § 2415 indicate that Congress extended the filing deadline in part to allow additional time for preparation and negotiation of tort claims for trespass damages arising from allegedly illegal expropriations of tribal lands—including the 144,000 acres claimed by the Catawbas. See, *e. g.*, 123 Cong. Rec. 22166-22167 (1977) (Rep. Cohen, discussing Catawba claim and others); *id.*, at 22168 (Rep. Walsh); *id.*, at 22170 (Rep. Hanley); 126 Cong. Rec. 5748-5749 (1980) (Rep. Holland, discussing Catawba claim); *id.*, at 5750 (Rep. Udall). Members of Congress emphasized repeatedly that Indian land claims were difficult to research, that Indians historically had lacked adequate legal assistance and administrative resources, and that the United States had not played its proper role in bringing suits on the Indians' behalf. See, *e. g.*, 123 Cong. Rec. 22170 (1977) (Rep. Collins); *id.*, at 22171 (Rep. Johnson); 126 Cong. Rec. 3289 (1980) (Sen. Cranston); *id.*, at 5745-5746 (Rep. Clausen; *id.*, at 5747 (Rep. Danielson); *id.*, at 5750 (Rep. Swift). See also 123 Cong. Rec. 22171 (1977) (Rep. Weiss) ("[A]s a result of the numerous injustices suffered by American Indians during the last 150 years—many at the hands of the American Government—it is incumbent on the United States to give these people—our country's first inhabitants—a full chance to redress their grievances"); 126 Cong. Rec. 3287 (1980) (Sen.

cluded that the text and legislative history of these statutes evinced a congressional belief that actions brought to enforce Indian property rights were not, and should not be, subject to filing deadlines other than those provided by federal statute. Borrowing a state statute of limitations in such a case "would be a violation of Congress' will." 470 U. S., at 244.

In determining whether the 1959 Division of Assets Act exempts the Catawbas' claim from this general principle, analysis must begin with the firmly established rule—which the Court today implicitly reaffirms, see *ante*, at 506—that ambiguities in statutes regulating Indian affairs are to be construed in the Indians' favor. See, *e. g.*, *Oneida II*, 470 U. S., at 247-248; *Bryan* v. *Itasca County*, 426 U. S. 373, 392 (1976); *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U. S. 649, 655, n. 7 (1976); *DeCoteau* v. *District County Court*, 420 U. S. 425, 444 (1975); *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 353-354 (1941); *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 (1918); *Choate* v. *Trapp*, 224 U. S. 665, 675 (1912); see generally F. Cohen, Handbook of Federal Indian Law 221-225 (1982). This rule is not simply a method of breaking ties; it reflects an altogether proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage a people whom our Nation long ago reduced to a state of dependency. The rule is particularly appropriate when the statute in question was passed primarily for the benefit of the Indians, as was the 1959 Division of Assets Act. Absent "clear and plain" language to the contrary, *Santa Fe Pacific*, 314 U. S., at 353, it must be assumed that Congress did not intend to belie its "avowed solicitude" for the Indians, *id.*, at 354,

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Melcher) (failure to extend statute of limitations could lead to "mass injustices"). Similar considerations presumably motivated Congress' decision to exempt entirely all claims for title or possession from the limitations period prescribed in § 2415.

with a "back-handed" abrogation or limitation of their rights, *Menominee Tribe* v. *United States*, 391 U. S. 404, 412 (1968).

The Court today evidently finds in § 5 of the Division of Assets Act "the clearly expressed intent of Congress," *ante*, at 506, that the Catawbas' tribal land claim was to be subject to South Carolina's statute of limitations. The Court relies largely on two provisions of § 5. The first renders inapplicable to the Catawbas all "special services performed by the United States for Indians because of their status as Indians," and "all statutes of the United States that affect Indians because of their status as Indians." The second provides that state laws shall "apply to [the Catawbas] in the same manner they apply to other persons or citizens." 25 U. S. C. § 935. Neither of these provisions, in my view, is able to bear the weight the Court places upon it.

A

The first provision merely renders federal Indian "services" and "statutes" inapplicable to the Catawbas. I agree with the Court that the provision makes the Nonintercourse Act, along with other Indian statutes, inapplicable both to individual Catawbas and to the Tribe. See *ante*, at 505-509. But that simply means that after the Division of Assets Act went into effect, the Tribe no longer was statutorily barred from selling or leasing its land. The services-and-statutes clause of the Act does not expressly abrogate or place procedural conditions on any *pre-existing* claims the Catawbas may have had, and the broad federal policy against application of state statutes of limitations to Indian land claims is neither a "service" nor a "statute."

The majority nonetheless asserts that this Court has "long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims." *Ante*, at 508. The cases it cites

for that proposition all were decided well before the emergence during the past 35 years of a clear congressional policy against the application of state statutes of limitations to Indian land claims. See *Oneida II*, 470 U. S., at 240-244. More importantly, all the cases cited by the majority involve lands for which patents had been issued to individual Indians, not lands alleged to remain tribal property. This Court made clear in *Oneida I* that claims arising under such patents are not federal claims at all, because, "[o]nce patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts." 414 U. S., at 676. In this case, however, as in *Oneida I*, "the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the substantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Id.*, at 677. Here, as in *Oneida I*, the complaint thus "asserts a present right to possession under federal law." *Id.*, at 675.

I do not see how a statute removing restraints on alienation can fairly be said to signal unambiguously a congressional intent to subject pre-existing tribal land claims arising under federal law to state statutes of limitations. But even if I agreed with the majority that the removal of restraints on alienation should trigger the application of state limitations periods, the 1959 Act lifted only *statutory* restrictions on the alienation of Catawba land, and the requirement that the Federal Government approve any transfer of the property at issue in this case did not, and does not, stem solely from any federal statute. The land set aside for the Catawbas in 1760 and

1763 was within the Tribe's aboriginal territory,[7] and their claim to the land thus derives from original title [8] as well as from the 18th-century treaties.[9] With respect to original title, at least, the Nonintercourse Act merely "'put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States.'" *Oneida II*, 470 U. S., at 240, quoting *Oneida I*, 414 U. S., at 678.[10]

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[7] John Stuart, the King's Superintendent of Indian Affairs, who had negotiated the Treaty of Augusta, noted in a 1772 letter to the South Carolina Governor that the 144,000 acres reserved for the Catawbas in that treaty were, "as well as a very considerable Extent of Country besides[,] possessed by them when the Subjects of England first Settled in this part of the World." 6 Record, Ex. 7, p. 1.

[8] See generally F. Cohen, Handbook of Federal Indian Law 486-493 (1982); Cohen, Original Indian Title, 32 Minn. L. Rev. 28 (1947); Note, Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial, 75 Colum. L. Rev. 655 (1975).

[9] This Court long has respected grants of land to Indian tribes by prior governments. See, *e. g.*, *United States* v. *Title Insurance & Trust Co.*, 265 U. S. 472, 484 (1924), quoting *Barker* v. *Harvey*, 181 U. S. 481, 491-492 (1901) ("'There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and its superior to the title of this government, and limits necessarily its powers of disposal'"); *Mitchel* v. *United States*, 9 Pet. 711 (1835).

[10] The federal common-law rule against alienation of aboriginal title without the consent of the sovereign was recognized as early as 1823 in Chief Justice Marshall's opinion for the Court in *Johnson* v. *McIntosh*, 8 Wheat. 543, 573-574 (1823), and it is reflected in the Constitution's Indian Commerce Clause, Art. I, § 8, cl. 3, which made "Indian relations . . . the exclusive province of federal law," *Oneida II*, 470 U. S., at 234, and n. 4. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 U.

There is nothing in the 1959 legislation that indicates that Congress intended to exempt the Catawbas from this common-law protection of undistributed tribal property as well as from its statutory codification. Nor is there anything to indicate that Congress meant to abrogate the protection promised to the Tribe under the treaties of 1760 and 1763, which the Tribe claims provide an independent source of continuing federal protection. Indeed, in rejecting an argument that a similar provision of the Menominee Termination Act destroyed treaty rights to hunt and fish, this Court, noted: "The use of the word 'statutes' is potent evidence that no *treaty* was in mind." *Menominee Tribe*, 391 U. S., at 412 (emphasis in original). In the same way, Congress' use in 1959 of the terms "services" and "statutes" suggests, if anything, that the Division of Assets Act was not intended to remove other sources of protection. Surely the selection of these terms provides no support for the view that Congress meant to impose new procedural requirements on pre-existing tribal land claims based not only on statutory provisions, but also on treaty rights and federal common law.[11]

Maine L. Rev. 17, 28-29 (1979). In *Oneida II*, the Court rejected a suggestion that Indian common-law rights to tribal lands were somehow swallowed up or pre-empted by the Nonintercourse Act; it made clear that the common law will furnishes an independent basis for legal relief. See 470 U. S., at 236-240.

[11] The Tribe's complaint requests relief under the treaties of 1760 and 1763, the Nonintercourse Act, the Indian Commerce Clause, Art. I, § 8, cl. 3, and the constitutional prohibition against state treaties, Art. I, § 10, cl. 1. App. 24. Reading the complaint liberally "so . . . as to do substantial justice," Fed. Rule Civ. Proc. 8(f), I would conclude that the constitutional references suffice to invoke the rule that original Indian title may not be alienated without federal approval. Cf. Brief for United States as *Amicus Curiae* in *Connecticut* v. *Mohegan Tribe*, O. T. 1980, No. 80-1365, p. 7 (describing the rule as "constitutionally based"). A narrower construction of the complaint would be especially inappropriate because the Tribe adopted the United States' brief in *Mohegan Tribe* as

B

The second provision of the 1959 Act relied on by the Court directs that "the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction." I agree with the Court that the word "them" must be understood to refer not only to individual Catawbas, but also to the Tribe. See *ante*, at 506-507. Clearly, however, "them" does not refer to *claims* brought by the Catawbas; the term encompasses the plaintiff in this case, but not the cause of action.

This distinction is critical. The "laws of the several States" provision of the Division of Assets Act placed the Catawbas on the same footing as non-Indians with regard to the application of state law. Just as a non-Indian's action based on South Carolina law must be brought within the time specified by the State, so a state-law action brought by a Catawba—or by the Catawba Tribe—must meet the same requirement. If a non-Indian in South Carolina brings a *federal* claim, however, the limitations period is determined by federal law. The same must hold for the federal claims raised by the Catawbas in this litigation.

Of course, the real question in this case is not whether federal law governs the limitations question, but whether

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part of its response in the District Court to the defendants' motion to dismiss, making clear that the constitutional claims raised in the complaint were to be read to embrace the common-law rule. See Plaintiff's Memorandum in Support of Motion for Leave to File Supplemental Memorandum and Supplemental Memorandum, 1 Record, Ex. 15.

Because, under my view, the Tribe's treaty claims add nothing material for present purposes to its common-law claim, I would not decide at this time whether the 1760 and 1763 treaties independently required the United States, as successor to Great Britain, to approve any sale or lease of the 144,000 acres. Why the majority finds no need to discuss this question, or the issue of common-law restraints on alienation, is harder to understand.

federal law should borrow South Carolina's period of limitations, notwithstanding the general federal policy against such borrowing in the context of Indian land claims. My point here is that this question is not answered by the statutory instruction to apply state law to the Catawbas "in the same manner" as it is applied to non-Indians. Subjecting a group of Indians to state law to the same extent as other citizens is far different from subjecting their unique federal claims to a state statute of limitations. For non-Indians as well as Indians, the decision whether to apply a state limitations period to a federal claim depends on whether such application is deemed contrary to federal policy. And nothing in § 5 of the Division of Assets Act unambiguously directs that, as a matter of federal policy, the Catawbas' unsettled tribal claims should be treated any differently for statute-of-limitations purposes from other tribal land claims. Indeed, there is no indication that Congress though about such claims at all.[12]

C

The Court does not rely exclusively on the terms of the two provisions discussed above, it also emphasizes that the Division of Assets as a whole represented an "explicit redefinition of the relationship between the Federal Government and the Catawbas," terminating "special federal protection" for the Tribe and its members. *Ante*, at 508; see also *ante*, at 510.[13] But if we take seriously

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[12] The Senate and House Reports both explained that the purpose of the 1959 legislation was "to distribute the bulk of the [Catawbas'] tribal assets" among the members of the Tribe. S. Rep. No. 863, 86th Cong., 1st Sess., 1 (1959); H. R. Rep. No. 910, 86th Cong., 1st Sess., 2 (1959). Each Report contained a list of the Tribe's assets; the list made no mention of the Catawbas' claim to their 18th-century treaty lands. See S. Rep. No. 863, at 3; H. R. Rep. No. 910, at 4.

[13] The majority rightly places little weight on the fact that § 5 of the 1959 Act revoked the Tribe's Constitution. The Catawbas

the "eminently sound and vital canon" that all ambiguities in statutes passed for the benefit of Indians are to be construed in the Indians' favor, *Northern Cheyenne Tribe*, 425 U. S., at 655, n. 7, then surely the effect of such an "explicit redefinition" must be limited to its explicit terms. The Court recognized as much in *Menominee Tribe*, *supra*, when it refused to read into the Menominee Termination Act an abrogation of the Menominees' treaty rights to hunt and fish. Regardless of the general thinking behind the termination policy of the 1950's, we are faced here with a particular statute, and we should not " 'strain to implement [an assimilationist] policy Congress has now rejected.' " *Bryan* v. *Itasca County*, 426 U. S., at 389, n. 14, quoting *Santa Rosa Band of Indians* v. *Kings County*, 532 F. 2d 655, 663 (CA9 1975).

Such straining is particularly inappropriate in this case, where the statute in question was passed at the Indians' behest, was apparently intended to carry out the Indians' wishes, and received the Indians' support based on federal assurances that it would not "affect the status" of their claim against the State. One, of course, can distinguish formally, as the majority does, see *ante*, at 510, between preserving the "status" of the claim and preserving the claim's immunity from the state statute of limitations. But the distinction smacks of the kind of semantic trap that this Court consistently has attempted to avoid when construing governmental agreements with Indians and statutes ostensibly passed for the benefit of Indians. In cases involving Indian treaties, for example, it has long been the rule not only that doubtful expressions must be construed in the Indians' favor,

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had no tribal constitution until 1944, when they adopted one pursuant to the 1943 Memorandum of Understanding. See, *e. g.*, H. R. Rep. No. 910, 86th Cong., 1st Sess., 5 (1959). Revocation of the Constitution therefore can hardly be understood as a statement that the Tribe should cease existence or lose any pre-existing claims.

but also that the entire treaty must be interpreted as the Indians would have understood it. See, *e. g.*, *Choctaw Nation* v. *Oklahoma*, 397 U. S. 620, 631 (1970); *Jones* v. *Meehan*, 175 U. S. 1, 11 (1899); *Worcester* v. *Georgia*, 6 Pet. 515, 582 (1832).

The Catawbas were assured in unqualified terms that the 1959 legislation would not jeopardize their century-old grievance against the State of South Carolina. The Act itself said nothing about the claim, and nothing about statutes of limitations. No one told the Indians or the voting Members of Congress that the statute might someday prevent the Tribe from pursuing its claim in court. The Court nevertheless concludes today that the 1959 Act bars the Catawbas' claim if the limitations period under South Carolina law expired between the passage of the Act and the initiation of this lawsuit in 1980, and that this interpretation of the statute comports with the promises made to the Catawbas in the 1950's. I cannot agree with either conclusion. In my view, this decision breaks faith once again with the Tribe, and it does so in a way the statute does not require. Nothing in the text or legislative history of the Act evinces a congressional desire to mislead the Indians, or an understanding that the Act sometime might be construed as it is by the Court today.

III

Apparently, there no longer are any full-blood Catawbas, and no one now speaks the Catawba language. See Charlotte Observer, Mar. 6, 1977, p. 1C, reprinted in Hearing, at 420. Of the 1,200 or so persons currently on the tribal roll, only about 5 or 10 percent live on the 630-acre reservation still held for the Tribe by the State of South Carolina.[14] The reservation itself does not dif-

[14] See, *e. g.*, Hearing, at 20 (statement of Leo M. Krulitz, Interior Department Solicitor; *id.*, at 39 (statement of Claude Ayres, Member, Catawba Indian Nation Land Claim Committee); Pro-

fer conspicuously from other rural neighborhoods in South Carolina. Indeed, "[a]n unobservant tourist may well drive through the reservation unawares, and many do." C. Hudson, The Catawba Nation 3 (1970). For the most part, modern-day Catawbas "think and live like ordinary Americans of the Southeast." *Ibid.*

When an Indian Tribe has been assimilated and dispersed to this extent—and when, as the majority points out, thousands of people now claim interests in the Tribe's ancestral homeland, see *ante*, at 499-500, and n. 4—the Tribe's claim to that land may seem ethereal, and the manner of the Tribe's dispossession may seem of no more than historical interest. But the demands of justice do not cease simply because a wronged people grew less distinctive, or because the rights of innocent third parties must be taken into account in fashioning a remedy. Today's decision seriously handicaps the Catawbas' effort to obtain even partial redress for the illegal expropriation of lands twice pledged to them, and it does so by attributing to Congress, in effect, an unarticulated intent to trick the Indians a century after the property changed hands. From any perspective, there is little to be proud of here.

Because I do not believe that Congress in 1959 expressed an unambiguous desire to encumber the Catawbas' claim to their 18th-century treaty lands, and because I agree with Justice Black that "[g]reat nations, like great men, should keep their word," *FPC v. Tuscarora Indian Nation*, 362 U. S. 99, 142 (1960) (dissenting opinion), I do not join the judgment of the Court.

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posed Catawba Indian Reservation Land Use Analysis 4 (1977), reprinted in Hearing, at 251, 258.

No. 88-1752

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA, *et al.*,
Petitioners,

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, INC.,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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STATEMENT PURSUANT TO RULE 28.1

The following lists the named defendant corporations by or on whose behalf the petition for certiorari herein is filed, and each of their parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates, if any:

Bowater Carolina Corporation and Catawba Timber Co. (now unincorporated divisions of Bowater Incorporated, whose non-wholly owned subsidiaries and affiliates are Catawba Newsprint Company, Bowater Mersey Paper Company Limited, and Pulpa y Papel Orinoco, S.A.)

Celanese Corporation of America (now known as Hoechst Celanese Corporation), a subsidiary whose ultimate parent is Hoechst A.G., and whose non-wholly owned subsidiaries are Celanese Mexicana S.A. and Celanese Canada Inc.

Crescent Land & Timber Corp., a subsidiary whose ultimate parent is Duke Power Company. Directly or through wholly owned subsidiaries, Crescent Land & Timber Corp. has a partial ownership interest in the following entities:

Tyvola Crossing Associates Limited Partnership
Roman Associates
Park Cedar Associates, Ltd.
Riverpointe Land Development Company No. 2
Coliseum Associates Limited Partnership
Matthews Village Partners
200 Meeting Street Limited Partnership
Sparkleberry Land Joint Venture Partnership
Festival Associates Limited Partnership
Fort Mill Hotel Associates Limited Partnership
Mint Street Capital Associates Partnership

Duke Power Company. In addition to the entities listed above with respect to its subsidiary Crescent Land & Timber Corp., through wholly owned subsidiaries Duke Power Company has a partial ownership interest in the following entities:

Black River Limited Partnership
Mecklenburg Cogeneration Limited Partnership
Commonwealth Cogeneration Partners, L.P.

Rock Hill Printing & Finishing Company (now an unincorporated division of Springs Industries, Inc.)

Southern Railway Company, a wholly owned subsidiary of Norfolk Southern Corporation. The subsidiaries of Southern Railway Company which have some public stock ownership are:

High Point, Randleman, Asheboro and Southern Railroad Company
Mobile and Birmingham Railroad Company
The North Carolina Midland Railroad Company
The South Western Rail Road Company
Transylvania Railroad Company
Yadkin Railroad Company

The subsidiaries of Norfolk Southern Corporation which have some public stock, debt, or other ownership are:

Norfolk and Western Railway Company
The Scioto Valley and New England Railroad Company
Wabash Railroad Company
Triple Crown Services, Inc.
Central of Georgia Railway Company

Springs Mills, Inc. (now known as Springs Industries, Inc.)

Tega Cay Associates

Wachovia Bank and Trust Company (now known as Wachovia Bank and Trust Company, N.A.), a subsidiary whose ultimate parent is First Wachovia Corp.

Ashe Brick Company (now an unincorporated division of Boral Brick Inc.)

Nisbet Farms, Inc.

Ardrey Farms

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In The

Supreme Court of the United States

October Term, 1988

STATE OF SOUTH CAROLINA, et al.,

v. *Petitioners,*

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,

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QUESTION PRESENTED

In *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986), this Court held that the 1959 Catawba Division of Assets Act required application of the South Carolina statute of limitations to the Catawba Tribe's land claims. Because the Court of Appeals had not reached the state law issue, this Court remanded the case. The question presented is:

Whether the Court of Appeals erred in its application of the South Carolina statute of limitations to the Tribe's federal claims to treaty lands when it ruled that the Tribe's claim is barred only against those persons who had adversely possessed property for 10 years after July 1, 1962 and before October 20, 1980, without tacking except by inheritance.

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STATEMENT OF THE CASE

I. Nature of the Case

In 1760 and 1763, the British Crown entered into treaties with the Catawba Indian Tribe under which the Tribe ceded vast portions of its aboriginal territory in return for the Crown's guarantee of protection for a 15-mile-square, 144,000-acre reservation. In 1840 the State of South Carolina, without the knowledge, consent, or participation of the United States, negotiated a "sale" of the Catawba Reservation, promising it would purchase a new reservation elsewhere for the Tribe. South Carolina took possession of the Treaty Reservation but failed to acquire a new reservation for the Tribe. In 1842, after the Tribe had wandered homeless for almost three years, the State bought back a 630-acre tract of the original Reservation as a "new" reservation for the Tribe. Today, the Tribe continues to occupy this tract, and the State continues to hold it in trust for the Tribe's benefit.

In 1980, after more than a century of unsuccessful efforts to resolve its claim legislatively and administratively, the Tribe filed suit seeking the return of its Treaty Reservation. The Tribe seeks a declaration that in 1763 it acquired a protected, recognized property right through its treaties with Great Britain and that since the adoption of the United States Constitution, its reservation lands have been protected by federal law. As a result, the 1840 "treaty" between the State and the Tribe is void, and the subject lands retain to this day their status as Indian tribal lands.

II. Prior Proceedings and the Issues For Review

The District Court postponed class certification and filing of answers in favor of first considering petitioners' motion for summary judgment based solely on the effects of the 1959 Catawba Tribe of South Carolina Division of Assets Act, 25 U.S.C. §§ 931-938 (1982) ("1959 Act"). The District Court granted summary judgment for petitioners, finding that the 1959 Act made state statutes of limitations applicable to the claim and that, as a result, the Tribe's claim was completely barred. (A. 49). On appeal, the Court of Appeals reversed the District Court but did not reach the question whether the South Carolina statute of limitations barred the claim because, in its view, state statutes of limitations did not apply to the claim [1] This Court granted certiorari to review a single issue – petitioners' "contention that, even if the Tribe's claim was valid before passage and enactment of the [1959] Act, § 5 of the Act made the state statute of limitations applicable to the claim." *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 500 (1986) (A. 57). This Court reversed the Court of Appeals and held that the 1959 Act did result in the application of the state statute of limitations to the Tribe's claim. Because the Court of Appeals had not reviewed the District Court's ruling that the Tribe's claim was barred by the South Carolina statute of limitations, this Court remanded the case to the Court of Appeals for consideration of the state law issue.

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[1] The Court of Appeals also held that the 1959 Act did not extinguish the Tribe's existence, did not ratify the 1840 Treaty, and did not terminate the federal trust relationship under the Nonintercourse Act. Catawba Indian Tribe of South Carolina v. State of South Carolina, 718 F.2d 1291, 1300 (4th Cir. 1983).

On remand, the parties filed supplemental briefs and oral argument was held before an *en banc* court on December 8, 1986. On August 4, 1987, the Court of Appeals certified the state law questions to the Supreme Court of South Carolina. On September 9, 1987, the South Carolina Supreme Court declined to answer the questions certified. The Court of Appeals then ordered additional briefing by the parties on the state law issues, after which a second oral argument before an *en banc* court was held in April, 1988.

On January, 23, 1989, the Court of Appeals held that because of South Carolina's "anti-tacking" rule, the state statute of limitations bars the Tribe's claim only against those possessors of land who can demonstrate that they or a predecessor had possessed the land adversely for 10 years after July 1, 1962 (the effective date of the 1959 Act), and before October 20, 1980 (the date this suit was filed). The 10 years must be continuous, *i.e.*, they cannot be arrived at by tacking successive periods of adverse possession, except in the case of inheritance.[2] The state statute of limitations does not bar the Tribe's claim against other persons. *Catawba Indian Tribe v. State of South Carolina*, 865 F.2d 1444, 1456 (4th Cir. 1989) (A.26).[3]

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[2] As explained *infra* in part B.1., South Carolina has three limitations periods applicable to land claims: 10, 20 and 40 years. Only the shortest (10 year) statute prohibits tacking of successive periods of possession.

[3] The Court of Appeals also ruled, in response to a jurisdictional argument raised by the dissent, that the Tribe's claims

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The issue for review is whether the Fourth Circuit correctly applied the South Carolina statute of limitations to the Catawba Tribe's federal law claims.

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals Followed This Court's Mandate And Correctly Decided The State Law Issue.

A. Petitioners' Assertion that the Court of Appeals Disregarded This Court's Mandate and Failed to Rely on State Law is Incorrect: Their Claim that the Court of Appeals was Determined to Disregard This Court's Mandate is Unwarranted.

Petitioners argue that "[t]he linchpin of the [Court of Appeals'] ultimate holding was its conclusion that policies embodied in *federal* law required that Indian title be considered the same as legal title," (Pet. 10) (emphasis in original), and that the decision below was therefore based on federal law rather than on state law as mandated by

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arise under federal law. In finding federal cause of action jurisdiction, the Court of Appeals relied on this Court's earlier holding in this case that the status of the Tribe's claim remained unchanged by enactment of the 1959 Act. In South Carolina v. Catawba Indian Tribe, 476 U.S. 498 (1986), this Court applied the rule that "federal claims are subject to state statutes of limitations unless there is a federal statute of limitation or a conflict with federal policy." *Id.* at 507 (A.65) (footnote omitted). This Court's application of this rule suggests that the Court did consider whether the Tribe's claims continue to arise under federal law, as does the Court's holding that the status of the claim remained unchanged after the 1959 Act.

this Court.[4] This argument grossly distorts the Court of Appeals' decision and is based upon misquotation and misrepresentation of dictum as holding. Contrary to petitioners' characterization, the decision below rests exclusively on South Carolina law.

The Court of Appeals' discussion of the key state law issue, *i.e.*, whether Indian title is legal title under South Carolina law, is contained in parts III and IV of the opinion below. In part III, the Court of Appeals considered whether "legal title" under S.C. Code Ann. § 15-67-210 (Law. Co-op. 1976) is restricted to "record title." The court's rejection of petitioners' argument is based on its construction of state statutes and application of the precedents established in five decisions of the South Carolina Supreme Court or its predecessors.[5] While

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[4] Petitioners apparently do not dispute that the Tribe's claims are federal law claims, as they make no mention in their petition of either the dissent's argument that the federal courts have no jurisdiction over the Tribe's claim because they are no longer federal claims or the majority's holding that the Tribe's claims are federal law claims. Rather petitioners state that "[j]urisdiction in the district court was asserted pursuant to 28 U.S.C. §§ 1331, 1337, and 1361." (Pet. 4).

[5] The oldest of these South Carolina cases held that the title established by a reservation by the Crown was superior under state law to title acquired through a subsequent grant by the state evidenced by regular deeds and conveyances. Hawkins' Devisees v. Arthur, 2 S.C.L. (2 Bay) 195 (1798). In another case, the Constitutional Court of South Carolina recognized Indian title as a legally enforceable estate under state law that was superior to title acquired through a subsequent grant from the state, holding that a state attempt to grant unextinguished Indian title was void. Thomas v. Daniel, 13 S.C.L. (2 McCord) 354 (1823).

part III contains an introductory recitation of the incidents of Indian title, the holding in part III rests entirely on the Court of Appeals' analysis of state law: "we conclude that based on its precedents the Supreme Court of South Carolina would hold that the Tribe's claim to legal title . . . is not defeated by lack of recording. . . ." *Catawba Indian Tribe v. State of South Carolina*, 865 F.2d at 1449-50 (A. 11).

Likewise, the holding in part IV of the Court of Appeals' decision rests entirely on state law. In part IV, the court addressed petitioners' argument that because Indian title cannot be alienated except by act of Congress, it is equitable title rather than legal title. The court first considered the nature of Indian title under federal law and concluded that under federal law Indian title is legal title. *Id.* at 1451 (A. 15). It then held without further discussion of state law, that:

> [W]e have no doubt that the Supreme Court of South Carolina, taking cognizance of the federal precedents and its own precedents, would hold that section 15-67-210 entitles the tribe to the presumption of possession.

Id. at 1451-52 (A. 15). The "federal precedents" referred to are those discussed by the Court of Appeals in part IV of its discussion and the phrase "its own precedents" refers to the state law cases discussed by the Court of Appeals in part III.[6]

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[6] The remainder of the Court of Appeals' analysis of the operation of the state statute of limitations, contained in parts II, V and VI of the opinion, discusses only state law.

Part IV also contains a brief discussion of the Tribe's argument that serious Supremacy Clause and Equal Protection Clause issues would be raised if a state were to denominate Indian title as equitable when under federal law it is a legal title, and then rely on that denomination to defeat the federal policies embodied in the Nonintercourse Act. But this discussion is dictum: the Court of Appeals did not reach these constitutional issues because of its confidence that the South Carolina Supreme Court would follow its precedents and those of federal law.

This dictum, however, is the basis for petitioners' attempt to manufacture an issue worthy of review by this Court. Although the Court of Appeals applied the state statute in a manner that will probably bar the major part of the Tribe's claims, petitioners incorrectly assert that the court "concluded that the statute of limitations should not apply to the respondent's claims because of the federal policy to protect Indian tribes in the rightful occupancy of their lands."[7] (Pet. 9). Elsewhere, petitioners

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[7] Petitioners also suggest that the Court of Appeals erred in treating the Tribe like an Indian tribe, implying that such treatment runs afoul of this Court's mandate. (Pet. 10-11). This Court's mandate, however, concerned application of the state statute of limitations, not whether respondent is to be treated as a tribe. Indeed, this Court "assume[d] that the respondent is the successor in interest of the Catawba Indian Tribe of South Carolina," *South Carolina v. Catawba Indian Tribe*, 476 U.S. at 500, n.2 (A.57), and did not review the Court of Appeals' holding that the 1959 Act did not extinguish the Tribe's existence. *See* note 1, *supra*.

build on that misstatement to contend that the Court of Appeals had a "determination to avoid the mandate of this Court" (Pet. 16) and a "determination *not* to apply the state statute of limitation to the Catawbas in precisely the same fashion as it applies to others." (Pet. 10) (emphasis in original).[8] In order to contrive this "failure to follow the mandate" issue, the petition not only misrepresents dictum in the opinion below as a holding, but inserts petitioners' own words into quotations of the Court of Appeals so as to distort and mislead.

The following quote is characterized in the petition as the "linchpin" holding of the Court of Appeals:

> [Application of the statute of limitation to the plaintiffs' claim] conflicts with the policy of the United

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[8] This argument is premised upon petitioners' characterization of Indian title as an estate foreign to those recognized and protected by state law – so foreign that the rules that would apply to "any other person or citizen" under South Carolina law should not apply to the Tribe. Petitioners apparently do not deny that any other person or citizen would, under South Carolina law, be permitted to avail themselves of the state's "anti-tacking" rule. (Pet. 6, n.5). But under petitioners' view the Tribe, because it possesses Indian title, should be denied the benefit of the presumption of possession that would be accorded to any other citizen of the State. The Tribe's Indian title cannot, however, be relegated to a lesser stature and denied the benefit of a presumption that would be available to other citizens. This Court held that the 1959 Act's only effect on this claim was to impose on the Tribe "an obligation to proceed to assert its claim in a timely manner as would any other person or citizen of the State." *South Carolina v. Catawba Indian Tribe,* 476 U.S. at 510 (A. 68). The Court of Appeals followed this Court's mandate and applied the state statutes of limitations to the Tribe "in precisely the same fashion that they apply to others." *Id.* at 506 (A. 63).

> States and the Nonintercourse Act. This policy and the Act protect Indian tribes in their rightful occupancy of their lands. To use the trusteeship created by the Constitution and implemented by the Act to defeat a tribe's right of occupancy would indeed be ironic and unjust.

(Pet. 10-11) (brackets by petitioners). The words actually used by the Court of Appeals are quite different:

> The argument that the Catawbas have equitable title precluding the tribe from invoking the presumption afforded by section 15-67-210 conflicts with the policy of the United States and the Nonintercourse Act. This policy and the Act protect Indian tribes in their rightful occupancy of their lands. To use the trusteeship created by the Constitution and implemented by the Act to defeat a tribe's right of occupancy would indeed be ironic and unjust. Serious issues involving the application of the Supremacy Clause and the Equal Protection Clause would arise if a state in violation of the Nonintercourse Act were to dispossess a tribe and then defeat a tribe's legal claim to possession by denominating its title as equitable. Fortunately, we need not address these constitutional issues because we have no doubt that the Supreme Court of South Carolina, taking cognizance of the federal precedents and its own precedents, would hold that section 15-67-210 entitles the tribe to the presumption of possession.

Catawba Indian Tribe v. South Carolina, 865 F.2d at 1451-52 (A. 15).

The words that petitioners substitute for those actually used by the Court of Appeals – "[Application of the statute of limitations to the plaintiff's claim]" – are of course the very essence of this Court's mandate in this case. But that is not what the Court of Appeals said would conflict with federal Indian policy. Rather, what

the court below said would conflict with federal Indian policy was petitioners' own "argument that the Catawbas have equitable title precluding the Tribe from invoking the presumption of possession afforded by section 15-67-210."

After reworking the court's language to suit their argument, petitioners then erroneously characterize the "quote" as the opinion's central holding. (Pet. 11). However, the portion of the paragraph "quoted" in the petition does not constitute the court's holding. It is dictum contained in the court's short analysis of constitutional issues that it does not reach. The actual holding, which the petition fails to quote, is contained in the last sentence of the paragraph. There the Court of Appeals makes it quite clear that its holding is based on state law, *i.e.*, its certainty that the South Carolina Supreme Court would follow the state law precedents discussed in part III of the opinion together with the consistent federal precedents discussed in part IV of the opinion.

This Court's prior ruling in this case was that application of the statute of limitations to plaintiff's claim *would not* conflict with the policy of the United States and the Nonintercourse Act. By substituting their own words for those of the Court of Appeals and then mischaracterizing those words as the court's linchpin holding, petitioners have represented that the Court of Appeals applied a standard and reached a result that is contrary to that mandated by this Court.

But the Court of Appeals did follow this Court's mandate. Any fair reading of its opinion shows that state

law forms the basis of the court's holdings. It conscientiously applied the state statute of limitations to the Tribe's claim. On remand, the Court of Appeals required the parties to submit two additional rounds of briefs and held two additional *en banc* arguments. It attempted to certify the state law questions to the South Carolina Supreme Court. And it was certainly mindful of this Court's mandate:

> [T]he Supreme Court has definitively decided the effect that Congress intended the Catawba Act to have on the tribe's claim. On this issue its decision is final. We are not at liberty to attribute to Congress a different intention in order to question jurisdiction. The Supreme Court has issued its mandate directing us to decide the issue pertaining to the state statute of limitations. *See* 476 U.S. at 511. Sound principles of appellate procedure counsel compliance with the Court's mandate. *See* Skillern's Ex'rs v. May's Ex'rs, 10 U.S. (6 Cranch) 267 (1810).

Catawba Indian Tribe v. South Carolina, 865 F.2d at 1456 (A. 26).

Petitioner's effort to manufacture an issue worthy of this Court's review is an obvious attempt to circumvent this Court's practice of "generally accord[ing] great deference to the interpretation and application of state law by the courts of appeals." *Pembaur v. Cincinnati*, 475 U.S. 469, 484, n.13 (1986); *See Propper v. Clark*, 337 U.S. 472, 486-487 (1949); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500, n.9 (1985).

B. The Court of Appeals Correctly Decided the State Law Issue: While South Carolina's 10-Year Statute does not Permit Tacking, the State's Policies of Stability and Repose are Satisfied by an Overall Limitations Scheme that Includes a 20-Year Presumption of Grant and 40-Year Statute of Repose Under Both of which Tacking is Permitted.

1. Because the Tribe's Claim was Filed Before the 20-Year Common Law Presumption of Grant Became Applicable (18 Years After the Statute of Limitations Began to Run), Only Those Defendants Who Can Prove 10 Years' Adverse Possession Without Tacking May Prevail Against the Tribe.

Petitioners argue that the Court of Appeals decision undermines the state policy of fostering stability and repose through foreclosing untimely claims. This argument, however, conveniently ignores the existence of the state's 20 and 40 year limitations periods under which tacking is permitted. Examination of the overall state scheme shows that a claim filed 18 years after the limitations period began to run is not necessarily regarded as untimely. South Carolina has seen fit, through its "anti-tacking" rule, to give the true owner of land a greater measure of protection against adverse claimants.[9]

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[9] The applicable South Carolina statutes are S.C. Code Ann. §§ 15-3-340 and 15-67-210 (Law. Co-op. 1976):

> § 15-3-340. First and second actions by individual for recovery of land.
>
> No action for the recovery of real property or for the recovery of the possession thereof shall be maintained

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In applying South Carolina's 10-year statute of limitations to the Tribe's claim, the status of the parties and the title they asserted as of July 1, 1962, must be considered. On that date, the state statute of limitations commenced to run against the Tribe. *South Carolina v. Catawba Indian Tribe*, 476 U.S. at 510 (A. 68). It is assumed that the Tribe possessed valid Indian title to the land as of that date, *Id.* at 500 (A. 57), and that the 1959 Act had no direct effect on the Tribe's Indian title. *Id.* at 510 (A. 68). Therefore, for purposes of petitioners' summary judgment motion, as of 1962 the Catawba Tribe is assumed to have had full possessory rights in the subject lands and petitioners or their predecessors are assumed to have been trespassers.

However, even though petitioners or their predecessors had no legal claim to the land in 1962, they were in possession; and South Carolina, like other states, permits possessors of land to defeat the landowner's legal

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unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action.

§ 15-67-210. Presumption of possession; when occupation deemed under legal title.

In every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law. The occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action.

title by showing actual possession or use adverse to that of the landowner. Unlike other states, however, South Carolina does not permit adverse occupants to unite or tack successive periods of possession in order to establish title pursuant to a statute of limitations. While unique, this "anti-tacking" rule applies only to the shortest of South Carolina's three adverse possession periods – its 10-year statute of limitations. Tacking successive periods of possession is permitted under South Carolina's 20-year common law presumption of grant and under its 40-year statute of repose. But because this suit was filed 18 years after the state statute of limitations became applicable, the 20-year common law presumption of grant and the 40-year statute of limitations are not at issue.

Under South Carolina's 10-year statute, once "legal title" has been shown, occupation of the premises by someone else is presumed to be permissive and the legal title holder is therefore presumed to have had possession within the ten years. By the explicit terms of the statute, anyone wishing to defeat legal title must show that their occupation was not permissive and that it lasted for 10 continuous years, except in the case of intestate succession.[10] The rationale underlying this rule lies in the characterization of the initial possession as tortious from its

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[10] This rule prohibiting tacking of successive periods of possession under the 10-year statute was succinctly stated by South Carolina's foremost commentator on property law:

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inception. From this it follows that the trespasser has no valid legal interest to convey until the 10-year statutory period has run.[11]

South Carolina's "anti-tacking" statute has been the subject of frequent judicial construction over the course of more than a century. A long and unbroken line of South Carolina Supreme Court decisions demonstrates a tenacious adherence to the rule that successive periods of adverse possession may not be tacked to achieve the 10-year period of limitations contained in S.C. Code Ann.

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> The rule in this State, contrary to the view of the overwhelming majority of jurisdictions, is that even though there be privity by deed or devise between successive adverse occupants of land, the possession of such occupants cannot be tacked to make out title by adverse possession under the statute of limitations. Such tacking has been permitted, however, in the case of a continuation by the heir of the possession of the ancestor dying intestate.

D. Means, *Survey of Property Law*, 10 S.C.L.Q. 90 (Fall 1958). Professor Means also states that if the adverse claimant is asserting title under the twenty year common law presumption of grant or the forty-year statute, tacking is permitted.

[11] The contrasting rationale that permits tacking under the 20-year common law presumption of grant lies in the presumption that the original entry was rightful from its inception. *See* Note, Effect of Disability of Landowner With Respect to the Acquisition of Adverse Rights by Another by Statute of Limitation, Presumption of a Grant, and Prescriptive Right in South Carolina, 10 S.C.L.Q. 292, 298 (Winter 1958).

§ 15-3-340.[12] The bar of the 10-year statute of limitations may not be invoked without proof of continuous adverse possession for ten years.[13] The South Carolina cases also make it clear that the 10-year statute of limitations must be asserted as an affirmative defense by each defendant. Assertion of the bar contained in S.C. Code Ann. § 15-3-340 requires "proof of actual, open, notorious, hostile, continuous and exclusive possession . . . ."[14]

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[12] *E.g.*, Crotwell v. Whitney, 229 S.C. 213, 220-21, 92 S.E.2d 473, 477 (1956); Adams v. Adams, 220 S.C. 131, 66 S.E.2d 809 (1951); Ellen v. Ellen, 16 S.C. 132 (1881); Love v. Turner, 71 S.C. 322, 51 S.E. 101 (1905); Haithcock v. Haithcock, 123 S.C. 61, 68, 115 S.E. 727, 729 (1923); Epperson v. Stansill, 64 S.C. 485, 42 S.E. 426, 427 (1902); Burnett v. Crawford, 50 S.C. 161, 27 S.E. 645, 647 (1897); Garrett v. Weinberg, 48 S.C. 28, 26 S.E. 3, 18 (1896).

[13] Adams v. Adams, 220 S.C. 131, 66 S.E.2d 809, 812 (1951), ("no one can interpose this bar except as may have held for the period prescribed by the statute."), *quoting* Ellen v. Ellen, 16 S.C. 132, 141 (1881); Sutton v. Clark, 59 S.C. 440, 38 S.E. 150, 156 (1901) ("[t]he length of time necessary to bar the plaintiff's right of recovery and confer title on the defendant [through adverse possession] is the same in each case."); Love v. Turner, 71 S.C. 322, 51 S.E. 101, 104 (1905).

[14] Crotwell v. Whitney, 229 S.C. 213, 220-21, 92 S.E.2d 473, 477 (1956); Gregg v. Moore, 226 S.C. 366, 371, 85 S.E.2d 279, 281 (1954); Stokes v. Murray, 102 S.C. 395, 87 S.E. 71, 72 (1915); Lewis V. Pope, 86 S.C. 285, 68 S.E. 680, 683-84 (1910).

2. *Predecessors of the South Carolina Supreme Court Have Recognized Both Indian Title and a Reservation Granted by the Crown to be Enforceable at Law and Superior to Subsequent Grants from the State: No South Carolina Cases Hold that "Legal Title" is Restricted to "Record Title."*

Petitioners argue that because the Tribe does not have a garden-variety "record title," it does not have legal title under S.C. Code Ann § 15-67-210. South Carolina law is clear, however, that both Indian title and the title created by a reservation by the Crown are enforceable titles at law, superior to ordinary grants and paper title, that will support recovery on their own strength. The South Carolina Supreme Court's predecessor has recognized Indian title as a legally enforceable estate superior to a subsequent grant from the state. *Thomas v. Daniel*, 13 S.C.L. (2 McCord) 354 (1823), held that a grant of Cherokee Indian lands, where the title had not been extinguished, as "void." *Id.* at 359.[15]

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[15] South Carolina statutory law also recognizes Catawba Indian title as a legal title. An 1808 statute, S.C. Code Ann. § 27-15-10 (Law. Co-op. 1976), provides:

> § 27-15-10. Catawba Indians may lease their lands.
>
> It shall be lawful for the Catawba Indians to grant and make to any person any lease or leases, for life or lives or term of years, of any of *the lands vested in them by the laws of this state; provided*, that no lease shall exceed the term of ninety-nine years or three lives in being.

(emphasis added). This statute, taken together with S.C. Code Ann. § 27-15-30 (Law. Co-op. 1976) which conveyed the State's

(Continued on following page)

In *Hawkins' Devisees v. Arthur*, 2 S.C.L. (2 Bay) 195 (1798), the Superior Court of Law considered in detail the nature of the title created by a reservation of lands by the Crown. In 1730, King George II by royal proclamation had offered "bounties of land" to induce settlement in upper South Carolina. A town was laid out, reserved for its inhabitants forever, surveyed and finally settled. The plat of survey was entered in the council books in 1732. Defendants claimed under the reservation and proclamation of 1730, their evidence of title being the plat of survey entered in the council books. Plaintiffs claimed the same land under "regular conveyances" going back to a grant from the colony in 1770, and objected to introduction of the plat of survey because it was not a grant, deed or conveyance.

In overruling plaintiffs' objection, the court explained that where the Crown reserved lands for public purposes and remained as trustee, there would never be any grant or deed evidencing title as there would be in the case of grants to individuals. The court found this lack of deeds and conveyances deducing a "clear and regular title down from the original grantee [the State]," *id.* at 196, to be no impediment to enforcing the reservation of lands

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(Continued from previous page)

reversionary rights in the Tribe's lands to non-Indian lessees of the Tribe and acknowledged that the plat of the reservation was filed with the Secretary of State, demonstrates that South Carolina recognized the Indians' title as a legal title under state law. Moreover, these statutes' descriptions of the respective titles of the Indians and the State are perfectly consistent with the nature of Indian title under federal law, *see* part II, *infra*, where Indian title is recognized at law and the federal or state governments, or their grantees, hold the reversionary interest, or underlying fee.

by the Crown against the holder of a regular paper title tracing back to a subsequent grant from the State.

Notwithstanding that the crown and the state as its successor held the reservation in trust for those persons who had a right of occupancy, the court held:

> As to the legal effect of this reservation, there could be no question about it. It amounted to a covenant in law, between the crown and the people, for whose use and benefit it was intended; that the land contained within the boundaries of that plat, should for ever thereafter be appropriated and disposed of, for the use and benefit of the inhabitants of the said town and township, and their heirs for ever, and to and for no other intent and purpose whatsoever.

2 S.C.L. (2 Bay) at 203.

Hawkins' Devisees establishes that under South Carolina law the title created by a reservation for a public purpose by the Crown is binding upon the State as the Crown's successor,[16] and is superior to and enforceable at law against an ordinary paper title. *Hawkins' Devisees* further establishes that the title to a reservation would never be a "record title" within the scope of operation of the state's system of land registration. Because "there was never any grant or deed to produce, the only evidence of such reservation is a copy of the plat entered in the council books." *Id.* at 198.

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[16] *See* Chisolm v. Caines, 67 F. 285, 287 (1894) holding that "the State of South Carolina succeeded to the obligation as well as the rights of the crown. She became, upon the Revolution, the owner of lands not granted by her predecessor. She is bound by these grants"; *citing* State v. Pacific Guano Company, 22 S.C. 50, 74 (1884); *see also* State Ex Rel. McLeod v. Sloan Const. Co., 284 S.C. 491, 328 S.E.2d 84 (S.C. App. 1985); Moore v. McClure, 4 S.C.L. 139 (1807).

The procedure described in *Hawkins' Devisees* for establishment of a reservation was followed by the Crown in the case of the Catawba Reservation.[17] It was created by the Crown for a public purpose pursuant to a royal proclamation. Following establishment of the Reservation, the Crown remained as trustee, and the plat of survey was filed with the Colony of South Carolina. S.C. Code Ann. § 27-15-30.

The holdings in *Hawkins' Devisees* and *Thomas v. Daniel* demonstrate clearly that under South Carolina law Indian title is enforceable at law, with no recording requirement, and is superior to ordinary deeds and conveyances tracing back to a grant from the state.

In addition to the South Carolina cases recognizing Indian title and reservation title as enforceable at law, the Court of Appeals relied on more current South Carolina law recognizing and enforcing titles without requiring recordation. *Haithcock v. Haithcock*, 123 S.C. 61, 115 S.E. 727 (1923) recognized that legal title may be established in any one of four ways, including adverse possession, and applied the statutory presumption relied on by the tribe without requiring proof of recordation or registry. Indeed, as the Court of Appeals points out, "the state has cited no case holding that proof of recording in the Registry of Mesne Conveyances is necessary in order to establish legal title within the meaning of section 15-67-210." *Catawba Indian Tribe v. South Carolina*, 865 F.2d at 1449 (A. 11). The court further noted that this lack of precedent

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[17] *See* Appeals Court Appendix at 105, 111, 136-37, 130-40; Complaint ¶¶ 12, 13, 14 and Attachment A.

was not surprising because "recording becomes material only when there are double conveyances by the same person, or where there are subsequent creditors." *Id. (quoting First Carolina Joint Stock Land Bank v. Hudgens,* 171 S.C. 18, 21, 171 S.E. 449, 451 (1933)).

The cases cited by petitioners in support of their notion that legal title can only be record title stand for no more than the proposition that the record may be and often is reflective of the legal title. Their argument also fails to account for title by adverse possession and passage of title by descent, where legal title is unquestionably not the same as record title. *See Sutton v. Clark* 59 S.C. 440, 38 S.E. 150 (1901); *Scott v. Woodard,* 2 McCord 161 (S.C. 1822); *Delleney v. Winnsboro Granite Co.,* 72 S.C. 39, 51 S.E. 531 (1905).

These state law authorities compel the conclusion that legal title under South Carolina law is not restricted to record title and that the South Carolina Supreme Court would recognize Indian title as legal title under section 15-67-210. Having shown legal title as of the date the statute of limitations became applicable, petitioners' possession is presumed to be in subordination to the legal title. This presumption must be rebutted by showing 10 years' uninterrupted adverse possession.

The Court of Appeals carefully applied the South Carolina statute of limitations to the Tribe's claim. This Court's general practice has been to accord such state law determinations "great deference." *Pembaur v. Cincinnati,* 475 U.S. at 484, n.13. Unless the lower court's determination is "clearly wrong," *The Tungus v. Skovgaard,* 358 U.S. 588, 596 (1959); "clearly erroneous," *United States v.*

Durham Lumber Co., 363 U.S. 522, 527 (1960); or "unreasonable," *Propper v. Clark*, 337 U.S. 472, 486-487 (1949), this Court has upheld lower courts' interpretations of state law. Here, the Court of Appeals' interpretation of state law is clearly correct. Adoption of petitioners' views would require this Court to revise the comprehensive state law scheme applied by the Court of Appeals and rewrite South Carolina law in a manner that the State legislature has never seen fit to do, *i.e.*, restrict "legal title" to "record title."

II. The Court Of Appeals Correctly Held That Under Federal Law, Indian Title Is Legal Title.

Petitioners argue that Indian title is not "actual title," rather, it is a mere right of occupancy that "does not constitute a property right at all." (Pet. 15). Therefore, "legal title" to the property is possessed by petitioners because they possess the underlying fee.

Petitioners seriously misapprehend the nature and status of Indian title. As noted by the Court of Appeals, a long line of decisions by this Court conclusively establishes that the title of Indian tribes to land is "as sacred and securely safeguarded as is fee simple absolute title." *United States v. Shoshone Tribe*, 304 U.S. 111, 117 (1938); *accord Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 669 (1974) *(Oneida I); Oneida v. Oneida Indian Nation*, 470 U.S. 226, 235 (1985) *(Oneida II); United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835).

This principle applies whether a tribe holds title pursuant to sovereign action, or pursuant to aboriginal use

and occupancy. *Oneida I*, 414 U.S. at 669-70; *see generally*, F. Cohen, *Handbook of Federal Indian Law*, 471-99 (1982 ed.). The Catawba Tribe asserts title under a 1763 treaty with the Crown. In *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1833), this Court established that the right of Indian tribes derived from treaties with a prior government are recognized as valid and enforceable under federal law. *Id.* at 755-56; *accord Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587-88 (1823) ("The validity of titles given by [prior governments] has never been questioned in our courts").

The title asserted by the Tribe in this case is recognized Indian title that is protected by the Fifth Amendment to the United States Constitution. Even as against the United States, it is a property right that cannot be extinguished without the payment of just compensation.[18] *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); and *see generally*, F. Cohen, *Handbook*, *supra* at 217-18, 485-86.

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[18] Petitioners fail to grasp the distinction between recognized Indian title and aboriginal Indian title, basing their mistaken notions about the nature of Indian title on selected quotes from cases discussing the nature of aboriginal rights as against the United States. *See*, F. Cohen, *Handbook*, *supra* at 488. This case, of course, concerns the nature of *recognized* Indian title as against third parties. As against the United States, aboriginal property rights are deemed not entitled to compensation on the theory that Congress has not sufficiently envinced an intent to recognize such rights on a permanent basis. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277-79 (1955) (aboriginal Indian title); Sioux Tribe v. United States, 316 U.S. 317, 331 (1942) (Executive Order title). The Catawba Tribe's title, however is recognized title because it is derived from a treaty with the Crown which is adopted as federal law.

Moreover, Indian title confers on Indian tribes "the 'unquestioned right' . . . to the exclusive possession of their lands." *Oneida II*, 470 U.S. at 235, *quoting Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Hence, Indian title, whether aboriginal or recognized, confers the power to bring possessory actions against third parties for ejectment and/or damages. *See Oneida II*, 470 U.S. at 235-236; and *see generally*, F. Cohen, *Handbook, supra* at 524, 526-28. In *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941), this Court held that a railroad was liable for trespass damages arising out of the railroad's illegal use of tribal land held by aboriginal title.

In contrast, the "fee" underlying Indian title held by the United States, or by states which comprise the original thirteen American colonies, or by grantees of these governments, does not confer present possessory rights in lands subject to Indian title. The "fee" holder is thus not empowered to interfere with the right of Indian tribes to exclusive possession, unless Congress has clearly indicated an intent to extinguish such tribal rights. *See, e.g., Wisconsin v. Hitchcock*, 201 U.S. 202 (1906); *Beecher v. Wetherby*, 95 U.S. 517 (1877); *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 344-47, 353-54 (1941); *Buttz v. Northern Pacific R.R. Co.*, 119 U.S. 55, 66 (1886). Hence, unless Congress has extinguished those tribal rights, conveyance of the "fee" underlying Indian title by the federal government or by states does not convey the tribe's exclusive and permanent possessory rights in the claimed land. *United States v. Santa Fe Pacific R. Co.*, 314 U.S. at 344-45; *Oneida II*, 470 U.S. 229-34.

These principles were summarized in Cohen's Handbook of Federal Indian Law:

> The Supreme Court has held that this underlying fee simple title to land subject to original Indian title can be conveyed by the holder of the fee subject to the Indian right of occupancy. And, as the Court observed in *Johnson*, unless Indian title to the land has been extinguished, any grant of the lands, even by the United States, is subject to original Indian title and does not extinguish or interfere with the Indian right of occupancy. The naked fee title in land subject to original Indian title gives the holder, whether the state or a private party, no present possessory interest in the land. Naked fee title merely constitutes a reversionary interest that becomes possessory only if Congress clearly and plainly extinguishes the Indian title.

F. Cohen, *Handbook, supra* at 489 (footnotes omitted).

Thus, any fee simple estate claimed by the State of South Carolina and its grantees is predicted only on such a reversionary interest. The State and its successors will have no rights in the property until such time as the rights of the Tribe have been extinguished with the consent of Congress.[19]

Petitioners' argument that Indian title is no title at all is premised on a misinterpretation of selected discussions contained in cases relating to the nature of aboriginal

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[19] Under South Carolina law, such a possibility of reverter is not an estate, "[f]or it has nothing like an estate about it. It is neither a present nor future right. It is a mere possibility. . . ." Adams v. Chaplin, 10 S.C. (1 Hill) Eq. 265, 277 (1833). Conversely, South Carolina law recognizes that "a possession which shall be deemed valid against the world is tantamount to the fee." Sutton v. Clark, 59 S.C. 440, 38 S.E. 150, 156 (1901)

Indian title vis-a-vis the United States. As pointed out in Cohen's *Handbook*, however, the argument "that aboriginal title vests no rights in an Indian Tribe" has never been accepted. *Id.* at 488. While *Johnson v. M'Intosh* held that aboriginal Indian title may not be conveyed by tribes to third parties, it did not consider the nature of recognized Indian title nor did it consider whether aboriginal title was an enforceable property right against third parties. As Cohen concludes: "The fact that tribes are entitled to receive trespass damages for illegal use of their lands by third persons implies that Indian title represents a perpetual right of use and occupancy (until extinguished) virtually equivalent to a fee interest against all but the United States." *Id.* at 488-89.

The Court of Appeals correctly held that with respect to any defendant other than the United States, Indian title and fee simple absolute title are virtually indistinguishable. Indian title is legal title under federal law.

III. Review At This Time Would Be Premature: The Complaint Has Not Been Answered And A Defendant Class Has Not Been Certified.

This appeal is interlocutory; a defendant class has not been certified and no answers to the complaint have been filed. While petitioners allege importance of this case to the affected landowners, no record has been developed of any economic disruption or hardship caused by this claim to date. Should the Tribe prevail on liability issues, it is likely that a federal court would fashion a remedy that

would take into account the "impossibility" of repossession. *Catawba Indian Tribe v. State of South Carolina*, 740 F.2d 305, 307 (4th Cir. 1984) (Murnaghan, J. concurring); *see Oneida II*, 470 U.S. at 253, n. 27.

IV. Petitioners' Exaggerated Fears Of Hardship Resulting From The Lower Court's Ruling Are Unfounded Because Congress Will Certainly Resolve This Claim If It Proceeds To The Merits.

In recent years Congress has been active in resolving major Indian land claims by implementing consensual settlement agreements.[20] These legislative settlements have been facilitated by lower federal court rulings that struck down preliminary defenses and affirmed the legitimacy of the tribal claims.[21] Indeed, the legislative history of each Eastern Indian land claim settlement act attributes the need for the legislation to the perceived credibility of the tribal claim.[22] The recent experience of the

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[20] *See, e.g.*, Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. § 1701 (1982); Maine Indian Claims Settlement Act of 1980, 25 U.S.C. § 1721 (1982); 1983 Connecticut Indian Land Claims Settlement Act, 25 U.S.C. § 1751.

[21] *See* Narrangansett Tribe of Indians v. So. R.I. Land Devel. Corp., 418 F.Supp. 798 (D.R.I. 1976); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); Schaghticoke Tribe of Indians v. Kent School Corp., 423 F.Supp. 780 (D.Conn. 1976).

[22] *See* H.R. Rep. No. 95-1453, 95th Cong., 2d Sess. 7-9, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1948; H.R. Rep. No. 96-1353, 96th Cong., 2d Sess. 12-13, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3786; S. Rep. No. 98-222, 98th Cong., 1st Sess. 7-8.

Catawba Tribe demonstrates that its claim, like those of other Eastern Indian tribes, cannot be fairly settled without benefit of judicial interpretation.[23] Should the case now proceed to the merits, settlement efforts will resume and this claim will be resolved by Congress as have other Eastern Indian land claims.

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[23] In 1976, in an effort to establish the credibility of the tribal claim without resorting to litigation, the Tribe renewed its 1908 request to the United States to initiate litigation on its behalf to recover the Treaty Reservation. One year later the Solicitor of the Department of the Interior concluded that the Tribe could establish a prima facie Nonintercourse Act claim and formally requested the Department of Justice to initiate legal action – but only in the event that efforts already underway to reach "an amicable, orderly settlement" should fail. Appendix to Respondent Tribe's Brief in Opposition to Petition for Certiorari (1985), Exhibit B, p.3a. Thereafter, two tribal settlement initiatives, resulting in detailed settlement proposals very similar to those enacted by Congress for other Eastern Indian tribes, *see* n. 20, *supra*, were rejected. Hearings on H.R. 3274, Hse. Comm. on Interior and Insular Affairs, 96th Cong., 1st Sess. 30-36, June 12, 1979; Hearings on H.R. 5494, Hse. Comm. on Interior and Insular Affairs, 97th Cong., 2d Sess., June 22, 1982 (unpublished).

CONCLUSION

The Court of Appeals followed this Court's mandate and correctly applied the South Carolina statute of limitations to the Tribe's claim. The petition should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA, *et al.*,
Petitioners,

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 28.1

The named defendant corporations by or on whose behalf this paper is filed, and each of their parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates, if any, are listed in the Supplemental Appendix to the Petition for Certiorari previously filed.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioners seek review of a decision of an *en banc* panel of the Fourth Circuit in order to completely resolve the potentially dispositive issue of whether the application of state laws to this claim barred the action in its entirety when it was commenced in 1980. This Court should grant review to resolve this threshold issue and avoid leaving thousands of innocent landowners at continuing risk.

A. There Is No Reason To Delay Resolution Of The Question Of Whether The Court Of Appeals Complied With This Court's Direction On Remand.

In an effort to minimize the importance of immediate review, respondent asserts that current landowners will be unharmed by the decision of the Court of Appeals prolonging this litigation because, respondent predicts,

Congress will "certainly" pass settlement legislation.[1] In essence the Catawbas ask this Court to aid them in extracting a payment from Congress by causing continued economic disruption and hardship to the thousands of landowners affected by this litigation.

Contrary to respondent's assertion, the Court cannot assume that the federal government will fund a settlement of this claim, now or ever. The unsupported assumption that Congress will rescue the landowners by agreeing to pay millions of dollars[2] for settlement ignores history. As respondent itself points out, two earlier legislative proposals to settle this claim never passed Congress.[3] The Rhode Island and Maine settlement acts cited by respondent were enacted during the administration of President Carter and the administration of President Reagan was far less inclined to provide even modest federal payments to settle Indian claims against non-federal defendants.[4] The administration of President

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[1] Respondent's Brief in Opposition at 26-28 (hereinafter cited as "Brief in Opposition").

[2] The land at issue is highly developed and has been estimated to be worth more than a billion dollars. H.R. 3274, 96th Cong., 1st Sess. (1979). In 1979 the Catawbas sought 30 million dollars from Congress to resolve their claim. Hearings on H.R. 3274 Before the House Comm. on Interior and Insular Affairs, 96th Cong., 1st Sess. 30 (1979).

[3] Brief in Opposition at 28, n.23.

[4] For example, the Connecticut settlement legislation cited by the Catawbas as an example of a federal rescue was originally vetoed by President Reagan, who, in his veto message, declared that it was the administration's policy to pay no more than half of any settlement of Indian land claim litigation against a state and private parties. President's Message to the Senate Returning S. 366 Without Approval, Cong. Rec. S4154-55 (1983). The Connecticut settlement legislation was subsequently amended and approved after the State of Connecticut agreed to contribute additional land and special services. The federal contribution amounted to less than one million dollars. Connecticut Indian Land Claims Settlement Act, 25 U.S.C. §§ 1751-1760 (1982).

Bush has opposed the most recent Indian land claim settlement legislation to come before Congress.[5] Moreover, there are indications that the present administration is opposed to federal intervention in this case.[6] The impropriety of a strategy which relies upon a legislative resolution of this claim was recognized by Judge Murnaghan in his concurrence in the decision previously reviewed by this Court:

> I take little solace in the consideration that a proper, fair and equitable result *may* possibly come about by reason of enlightened, but by no means mandatory, legislative or executive action. Such a posture would still leave too many innocent good faith landowners at an awesome risk that political realities related to efforts by both sovereigns [*i.e.*, United States and South Carolina] to right a long standing wrong, might lead to the Queen of Spades ultimately winding up in the hands of the individual owners.

Catawba Indian Tribe of South Carolina v. *State of South Carolina*, 740 F.2d 305, 306 (4th Cir. 1986) (emphasis in original).[7]

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[5] On May 18, 1989, the Administration announced opposition to H.R. 932, 101st Cong., 1st Sess. (1989), which would require a federal contribution to implement a proposed settlement of land claims asserted by the Puyallup Indians. According to the announcement, the bill was objectionable, *inter alia*, because "there is little risk of Federal liability with regard to any claims related to the settlement. . . ."

[6] On May 3, 1989, the Honorable John M. Spratt, the Congressional Representative from the district which includes the land at issue herein, was quoted as follows:

> The Office of Management and Budget, the Interior Department, and the Bureau of Indian Affairs take the position that the federal government dissolved its relationship with the Catawbas long ago, and therefore will not prosecute or get involved in any way.

States New Service, Nexis.

[7] The Catawbas' apparent reliance upon this opinion of Judge Murnaghan to suggest that years from now some court might apply

B. The Court Of Appeals Disregarded This Court's Mandate To Apply The Laws Of South Carolina Including Its Statute Of Limitations To The Respondent In The Same Fashion As To Other Citizens.

The Catawbas' most inflammatory argument is that the defendants misconstrued the basis of the Court of Appeals' decision in order to "distort" the language of the Court of Appeals and "mislead" this Court. (Brief in Opposition at 8). To the contrary, the defendants fairly presented the basis and the language of the decision, and that decision contravenes this Court's mandate that the statute of limitations be applied to the Catawbas in the same fashion as to other citizens.

In Section IV of its decision, the Court of Appeals addressed the defendants' argument that the Catawbas have equitable, not legal, title because Indian title is inalienable. The Court of Appeals began its analysis by considering this Court's decisions on Indian title. After analyzing six such decisions,[5] the Court of Appeals opined that "[t]hese precedents establish that as a matter of federal law, for the purpose of recovering possession of real property and damages against any defendant other than the United States, Indian title is equivalent to fee simple absolute title. It is legal title." (A. 15); *Catawba Indian Tribe v. State of South Carolina*, 865 F.2d 1441, 1451 (4th Cir. 1989).

None of those cases holds that the Catawbas' claim to recover land is the equivalent of legal title. Nonetheless,

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equitable principles and not grant the Catawbas the relief their own complaint seeks is disingenuous. The complaint prays for possession and trespass damages as to all 27,000 parcels of land in the claim area and has never been amended; nor have the Catawbas ever otherwise conceded that they do not seek possession of all of the claimed land.

[5] *Oneida Indian Nation of New York State v. County of Oneida, New York*, 414 U.S. 661 (1974); *United States v. Tillamooks*, 329 U.S. 40 (1946); *United States v. Shoshone Tribe*, 304 U.S. 111 (1938); *United States v. Kagama*, 118 U.S. 375 (1886); *Mitchel v. United States*, 34 U.S. (9 Peters) 711 (1835); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

the Court of Appeals reasoned that *federal policy* would conflict with a finding that Indian title was equitable, rather than legal, title *under South Carolina law*:

> The argument that the Catawbas have equitable title precluding the tribe from invoking the presumption afforded by section 15-67-210 conflicts with the policy of the United States and the Nonintercourse Act. This policy and the Act protect Indian tribes in their rightful occupancy of their lands. To use the trusteeship created by the Constitution and implemented by the Act to defeat a tribe's right of occupancy would indeed be ironic and unjust.[9]

The Catawbas seek to relegate this centrally important portion of the Court of Appeals' opinion to *dictum*. However, a fair reading of the opinion indicates that this section is critical to the Court of Appeals' holding.[10] The Court of Appeals squarely relied on its perception of the policy of the United States as embodied in, for example, the Nonintercourse Act to conclude that the Catawbas may (or indeed must) be afforded the presumption South Carolina grants to those who possess legal title. Having so concluded, the Court of Appeals went on to hold that this legal title entitled the Catawbas

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[9] A.15; 865 F.2d at 1451. The Catawbas' complaint that the Court of Appeals' opinion was improperly excerpted is wholly without merit. The Petitioners did no more than modify the first sentence of the quoted section to make clear the relationship between "legal title" and the application of the statutes of limitation. There can be no doubt that, had the Court of Appeals held that Indian title is mere equitable title, the Respondent would have been precluded from invoking the presumption of section 15-67-210 and that, as the defendants said in their petition, the statute of limitations would have applied to the Catawbas' claim.

[10] What arguably is dictum is the section of the opinion immediately following the above quoted language on the possible constitutional ramifications of a decision that the Respondent possesses equitable, rather than legal, title. In this instance, having raised the constitutional question, the Court of Appeals went on to state that "we need not address these constitutional issues . . ." (A. 15); 865 F.2d at 1451.

to the presumption of possession of section 15-67-210 to avoid the ten year statute of limitations of section 15-3-340.

By relying on its perception of federal Indian policy to conclude that Indian title equals legal title under South Carolina law, the Court of Appeals unquestionably failed to honor this Court's mandate to apply the South Carolina statute of limitations to the Catawbas in precisely the same fashion as it applies to others. (A. 63); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). This Court did not remand for a determination of what federal policy suggests South Carolina law should be, but for a determination of what South Carolina's law is when applied to the Catawbas in the same manner as to other citizens.

C. This Court's Prior Decisions Establish That Indian Title Is Not Legal Title.

The Catawbas do not attempt to distinguish the three decisions the defendants rely on in support of their position that South Carolina, or its grantees, have exclusive title to the land at issue, and that the respondent, by virtue of its presumed Indian title, possesses a mere right of occupancy to the property. (Petition at 12-15). Instead, they offer a series of uncontroverted observations about the nature of Indian title, an unsupported assertion about the nature of fee title, and a misleading reference to a distinction between aboriginal Indian title and Indian title that has been recognized by a sovereign.

The Catawbas assert that Indian title is "sacred" whether a tribe holds aboriginal or recognized Indian title, and that recognized Indian title is a property right that cannot be extinguished by the United States without just compensation. (Brief in Opposition at 22-23). Whatever may be the merits of those assertions, none has any bearing on the issue of whether Indian title is legal title under South Carolina law.

The Catawbas then assert that fee title "does not confer present possessory rights in lands subject to Indian title." (Brief in Opposition at 24). The Catawbas' emphasis on possessory rights wholly misses the point. The issue is whether the Respondent has legal title to the property under South Carolina law, and this Court has stated that the sovereign, or its grantees, have "exclusive" and "clear" title to the property. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574, 584-85 (1823).[11]

D. The Respondent's Argument Repeats The Court Of Appeals' Misinterpretation Of State Law.

The petitioners have shown that the Court of Appeals' mistaken focus on federal Indian policies led it to misinterpret state law. The Court of Appeals improperly presumed the timeliness of the Catawbas' claim by presuming the merits of the claim, an error of logic that makes the statute of limitation virtually meaningless and undermines the state's strong policies requiring the recordation of land titles and favoring stability and repose in land transactions. Rather than addressing these arguments, the Catawbas' response repeats the faulty reasoning of the Court of Appeals.

This confusion between the merits and the timeliness of the Catawbas' claim is reflected in the respondent's discussion of state law. For example, their brief discusses at length two cases [12] which, the Catawbas suggest,

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[11] The Catawbas' argument also fails to grasp the unimportance of the distinction between recognized and aboriginal Indian title in the present context. (Brief in Opposition at 23, n.18). Having stated that such a distinction exists, the Catawbas do not attempt to explain the relevance of this distinction. In point of fact, there is no distinction between recognized and aboriginal Indian title in the present context. The cases relied upon by the Petitioners to establish the contours of Indian title and fee title apply equally to property as to which either recognized Indian title or aboriginal Indian title is asserted.

[12] *Thomas* v. *Daniel*, 13 S.C.L. (2 McCord) 354 (1823); *Hawkins' Devisees* v. *Arthur*, 2 S.C.L. (2 Bay) 195 (1798).

hold that interests of the sort asserted by them are "enforceable titles at law, superior to ordinary grants and paper title." (Brief in Opposition at 17-20). But the issue now is not whether, on the merits, the Catawbas' claim is enforceable against the thousands of landowners who possess the land under record title. The issue is whether the Catawbas, having been out of possession and having delayed in bringing their case for more than a decade after the effective date of the Catawba act, are barred from asserting their claim under S.C. Code Ann. § 15-3-340, or may take advantage of the exception embodied in S.C. Code Ann. § 15-67-210 for claimants who have "legal title."

Indeed, only one of the South Carolina cases discussed by the respondent at pages 17-22 of their brief, *Haithcock* v. *Haithcock*, 123 S.C. 61, 115 S.E. 727 (1923), involves the application of the limitation statute, and that case does not support the application of the "legal title" exception under section 15-67-210 to save the Catawbas' claim. Referring to the presumption of possession flowing from legal title, the *Haithcock* court charged that "under the law, if one shows paper title—a deed or will or legal paper title of any kind, to land—then the law presumes that he was in possession . . ." *Id.*, 123 S.C. at 69, 115 S.E. at 729. The crux of the Catawbas' claim is not that they have title under some arguably valid but unrecorded paper title; to the contrary, the Catawbas' present claim to recover possession of the land is predicated on the alleged invalidity of the paper title transferred by the Treaty of Nation Ford.

If the Catawbas' claim is viewed without reference to their purported status as an Indian tribe, there can be no doubt that the claim is barred by the statutes of limitation. The Catawbas are claimants who remained out of possession of the land for more than ten years before bringing suit. Their claim is not based on any recorded instrument which might have put the landowners in pos-

session on notice of the claim or to which the landowners' possession could be presumed to be subordinated. Indeed, the crux of their claim is a challenge to the validity of the "legal title" as recorded in the land records of South Carolina. Accordingly, they were required, the same as any other South Carolina citizen, to assert their claim within ten years.

CONCLUSION

For the reasons set forth above and in the Petition previously filed, this Court should grant review to compel the Court of Appeals to comply with this Court's earlier decision.

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